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NO. 927

IN THE

Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S. A., ET AL.,
Petitioners,

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

On Behalf Of
MITSUBISHI INTERNATIONAL CORPORATION, ET AL.

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
Bank of the Southwest Bldg.
Houston, Texas 77002

BLADES, CRAIN, SLATOR, WINTERS & ROSS
San Jacinto Building
Houston, Texas 77002

SWEENEY J. DOEHRING
E. V. GREENWOOD
JOSEPH NEWTON
Bank of the Southwest Bldg.
Houston, Texas 77002

NEWTON M. CRAIN, JR.
San Jacinto Building
Houston, Texas 77002

Counsel for These Petitioners

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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PETITION FOR WRIT OF CERTIORARI
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On Behalf Of
MITSUBISHI INTERNATIONAL CORPORATION, ET AL.

Petitioners, Mitsubishi International Corporation, et al. (hereinafter referred to as "these petitioners"), innocent owners of cargo on the Chinese Freighter UNION RELIANCE (hereinafter sometimes referred to as "the freighter"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 27, 1966, insofar, but only insofar, as said judgment affirms

a dismissal by the District Court of these petitioners' libel against the Norwegian Tanker BEREAN (hereinafter sometimes referred to as "the tanker") and her owner, A/S A. O. Andersen & Co., and holds that vessel and her owner free of fault and liability for the collision.

IN THIS IMPORTANT CASE THE FIFTH CIRCUIT, IN A RADICAL DEPARTURE FROM LONG-SETTLED RULES OF SAFETY AND WELL-DEFINED PRINCIPLES OF COLLISION LAW, AFFIRMED THE DISTRICT COURT IN HOLDING BLAMELESS AN OCEAN TANKER NAVIGATING UP THE NARROW HOUSTON SHIP CHANNEL ON A DARK NIGHT, WITH HER BOW TANKS FULL OF HIGHLY INFLAMMABLE AND TOXIC MATERIAL, AT FULL SPEED, WITHOUT A LOOKOUT OR ANCHOR WATCH. THE COURTS FURTHER HELD THAT THE TANKER NEED NOT IMMEDIATELY SOUND THE DANGER SIGNAL AND REVERSE ENGINES WHEN HER PILOT SAW AN APPROACHING FREIGHTER IN A POSITION FROM WHICH HE RECOGNIZED THAT SHE WAS LIKELY TO SHEER OUT OF CONTROL INTO THE TANKER'S WATERS, AND FROM WHICH POSITION SHE DID IN FACT SHEER OUT OF CONTROL INTO SAID WATERS. THE EFFECT OF THE DECISION, WHICH ALSO EXCUSED OTHER SERIOUS FAULTS ON THE PART OF THE TANKER, IS TO EXONERATE A VESSEL THAT WAS AWARE OF DANGER OF AN IMPENDING COLLISION, BUT CHOSE TO DO NOTHING WHATSOEVER TO AVERT IT! THE DISASTROUS COLLISION THAT FOLLOWED COST THE LIVES OF TWELVE MEN, SERIOUS INJURIES TO SEVERAL OTHERS, AND MORE THAN TWO

MILLION DOLLARS IN PROPERTY DAMAGE! IF SUCH CONDUCT IS TO BE CONDONED BY THE COURTS IN A SERIOUS COLLISION CASE SUCH AS THIS, THEN HENCEFORTH NO VESSEL NEED CONSIDER HERSELF BOUND BY THE RULES OF THE ROAD, "LAWFUL NAVIGATION" AND "SAFE NAVIGATION" WILL NO LONGER BE SYNONYMOUS, AND THE ENSUING HAVOC WILL RESULT IN IRREPARABLE DAMAGE TO THE MARINE COMMERCE OF THIS COUNTRY. WE DO NOT THINK THIS HONORABLE COURT WOULD KNOWINGLY PERMIT SUCH A RADICAL DEPARTURE FROM LONG-SETTLED PRINCIPLES OF PRUDENT NAVIGATION.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in this consolidated case is reported at 364 F.2d 769 and appears *infra* (together with the Order of said Court of October 7, 1966, denying petitions for rehearing) as Appendix B, p. 3a, et seq. The opinion of the United States District Court is reported at 222 F.Supp. 874 and is printed *infra* as Appendix C, p. 59a, et seq.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was entered on July 27, 1966, and is set forth in the Opinion printed *infra* as Appendix B, p. 3a, et seq. Thereafter China Union Lines, Ltd., a petitioner under separate petition for certiorari in this consolidated cause, presented to the Court of Appeals a petition for rehearing, which was denied without further opinion on October 7, 1966 (See Appendix B, p. 58b). An order staying mandate of said Court on behalf of China Union Lines, Ltd., was

entered on October 11, 1966, staying the mandate for a period of ninety days from that date. An order staying mandate of said Court on behalf of Lan Jing-Chau, et al., was entered on October 17, 1966, staying the mandate for ninety days from that date.

Jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. Sec. 1254(1).

Jurisdiction of the United States District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C.A. Sec. 1333(1).

QUESTIONS PRESENTED

The United States Court of Appeals for the Fifth Circuit affirmed the District Court, exonerating a Norwegian tanker navigating up the Houston Ship Channel at night, with a cargo of highly inflammable and toxic material in her bow tanks, at full speed without a lookout and without an anchor watch in a meeting-situation collision with a Chinese freighter. The District Court found, and the Fifth Circuit sustained findings, that those aboard the tanker when about a mile away from the freighter saw the freighter so far to her starboard in a bend to the freighter's left that she appeared likely to sheer out of control across the narrow channel into the waters the tanker expected to occupy, and yet the tanker on so observing the freighter failed immediately to sound danger signals and reverse her engines. The courts found that on seeing the freighter in this condition, those aboard the tanker became "somewhat apprehensive" but continued on and sounded one blast of her whistle for a port to port passing

and turned right the amount required to make such passing without receiving a reply to her signal. During all of this time, and thereafter while the vessels closed to a distance of about a quarter of a mile, the freighter moved across the channel, exactly as those aboard the tanker had apprehended (although for a different reason), and collision occurred on the tanker's right hand side of the channel. The questions presented are:

1. Whether the tanker violated Rule III of Article 18 of the Inland Rules (33 U.S.C.A. § 203, Rule III) in failing immediately to sound danger signals and to reverse engines on observing the freighter in a position from which she was likely to sheer out of control across the channel into the waters the tanker expected to occupy.

2. Whether the tanker violated Rule I of Article 18 of the Inland Rules (33 U.S.C.A. § 203, Rule I) in sounding one blast and turning right an amount sufficient to make a port to port passing with the freighter without receiving an assent to her signal and at a time when those aboard her were "somewhat apprehensive" as found by the courts.

3. Whether the tanker's proceeding at full speed in the Houston Ship Channel at night with highly inflammable and toxic cargo in her bow tanks was a violation of 33 C.F.R. Sec. 207.180(e)(3)(ii) in spite of the evidence of custom relied on by the courts to exonerate the tanker from this charge.

4. Whether the tanker, on mere negative evidence that those aboard her did not hear a series of danger signals from the freighter, sustained her burden under the rule of *THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1874), to show that her failure to have a lookout not only probably

was not, but could not have been, a proximate cause of the collision.

5. Whether the tanker was at fault in failing to drop her starboard anchor in an effort to avoid the collision, as ordered by her pilot shortly after she sounded one blast and turned to her right.

6. Whether all of these faults taken singly or together constituted at the very least minor fault on the part of the tanker rendering her liable to petitioners as innocent owners of the freighter's cargo.

STATUTES INVOLVED

The statutory provisions and regulation involved are:

(1) Rule III of Article 18 of the Inland Rules, 33 U.S. C.A. Sec. 203, Rule III.

(2) Rule I of Article 18 of the Inland Rules, 33 U.S. C.A. Sec. 203, Rule I.

(3) Article 29 of the Inland Rules, 33 U.S.C.A. Sec. 221.

(4) 33 C.F.R. Sec. 207.180(e)(3)(ii).

The above statutory provisions and regulation are set forth at length *infra* as Appendix A, p. 1a, et seq.

STATEMENT OF CASE

At about 11:15 on the night of November 7, 1961, in the 400-foot wide Houston Ship Channel the Norwegian Tanker BEREAN, carrying a cargo of highly inflammable and toxic acrilonitrile in her bow tanks, collided violently in a meeting situation with the Chinese Freighter UNION RELIANCE. As an immediate result of the collision the tanker's bow tanks were ruptured; the acrilonitrile spewed

out, exploded and burned; and large quantities of the flaming liquid poured over the bow of the freighter, resulting in the deaths of her pilot and eleven of her crewmen and the severe burning of her master and others. The fire burned on for many days; the freighter became a total loss; and a substantial amount of these petitioners' cargo was destroyed or severely damaged by fire, water and exposure to the elements.[1]

Having been sued by the United States for the expense of removing the burning freighter from the channel and related expenses and fearing suits by the owners of other property lost or damaged in the collision, as well as by the injured persons and the personal representatives of the deceased, the owner of the freighter filed a petition for limitation of liability, which was ultimately consolidated for trial with various suits (including that of these petitioners) against the tanker and her owner for virtually the same damages.[2] Jurisdiction in the District Court was based on the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C.A. Sec. 1333(1).

While the preponderance of the evidence at the trial overwhelmingly established serious, contributing faults on the part of the freighter and her owner, and clearly justified and indeed compelled findings of their liability, as well as denial of her owner's right to limit liability,[3] there was also a substantial amount of evidence pointing to and requiring findings of fault and liability on the part of the

1. See District Court's Opinion in Appendix C, p. 59a.

2. See District Court's Opinion in Appendix C, pp. 59a-62a.

3. See District Court's Findings of Fact 2, 3, 4, 7, 9, 28, 29, 30, 31, 32, 33, 34 and 35 appearing at pp. 63a-79a in Appendix C and the Circuit Court's Opinion at pp. 33a-36a in Appendix B.

tanker and her owner. This latter evidence, whether by reason of a sense of the more serious character of the faults of the freighter and her owner or for other reasons not clearly apparent, the courts below chose either to rationalize away or to ignore, although including in the fact findings matters requiring legal conclusions of fault and liability on the part of the tanker.[4] It is this latter action on the part of the lower courts that causes these petitioners to seek the writ of certiorari.

The facts forming the basis for the more serious charges of fault on the part of the tanker may be briefly summarized from the findings of the lower courts in effect as follows. Those on the tanker, when about a mile away from the freighter and traveling at full speed in this very narrow channel without a lookout or anchor watch of any kind, sighted the meeting freighter in a 15° bend in the channel to the freighter's left and the tanker's right. The freighter was then so far over to her own right hand side of the channel in the bend that the pilot on the tanker saw that the freighter was likely to sheer out of control from such position across the channel into the waters occupied and intended to be occupied by the tanker.[5]

On seeing the freighter so positioned in the channel, those on the tanker remarked about the unusual and dangerous position of the freighter[6] (and thereafter made log

4. See District Court's Findings of Fact 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, 37, 38 and 39 appearing at pp. 68a-80a in Appendix C and the Circuit Court's Opinion at pp. 15a-27a in Appendix B.

5. For the crucial testimony of Pilot Charles C. Lary, Jr., of the BEREAN on this point please see Appendix D at pp. 86a-96a hereof.

6. See District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and Pilot Charles C. Lary's testimony at pages 87a and 90a of Appendix D.

entries[7] describing such position) and in the words of the courts below, became "somewhat apprehensive."[8] However, the tanker failed immediately to sound the danger signal and reverse her engines, as required by Rule III of Article 18 of the Inland Rules of the Road, 33 U.S.C.A. Sec. 203, Rule III, and the authorities construing said rule. Instead, those on the tanker (in clear violation of Rule I of Article 18 of the Inland Rules of the Road, 33 U.S.C.A. Sec. 203, Rule I, and the authorities construing said rule) sounded one blast, requesting a port-to-port passing, and, before receiving any reply to such signal, turned to her right in the channel an amount sufficient to make such a passing.[9]

During the next minute and a fraction, by her own evidence, the tanker traveled about 1400 feet up the channel toward collision with the freighter,[10] which had in the interim, as anticipated by the tanker (although for a different reason), completed her sheer across the channel into the tanker's waters.[11] During this same period of time, according to the courts' findings, the freighter had reversed engines, dropped her starboard anchor (with 600 feet of chain)[12] and dropped her port anchor, all in an effort to stop before collision.[13]

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7. See testimony of the tanker's master as to her log entries on this point (R. 3490 and 3495).

8. See the District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and the Circuit Court's Opinion at pages 16a and 19a of Appendix B.

9. See the District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and R. 3591 and the Circuit Court's Opinion at pages 16a and 19a of Appendix B.

10. See pp. 92a-93a of Appendix D (R. 3591-3592).

11. See the District Court's Findings of Fact 19, 20, 21, 22 and 23 at pp. 71a-73a of Appendix C.

12. See R. 1429 ff. regarding location of anchors.

13. See the District Court's Findings of Fact 19, 20 and 21 on p. 71a of Appendix C.

According to the overwhelming weight of the evidence, during this same period and for some time preceding it, those on the freighter had been sounding a long, loud series of danger signals to the tanker to warn her of the steering casualty which actually caused the freighter to sheer.[14] However, the District Court found (on mere negative evidence from the "lookoutless" tanker that such signals were not heard on her noisy bridge 350 feet aft of her bow) that such signals were not sounded. (Anomalously, though finding that danger signals were not sounded by the freighter, the courts below, without discussing the point, permitted a full recovery of damages for her husband's death by the widow of the freighter's pilot, the person on the freighter clearly chargeable with the duty to sound such signals and the consequences of failure to sound them, if they in fact were not sounded.)

Although the pilot of the tanker, about two minutes before the collision, ordered her starboard anchor dropped for the purpose of slowing her speed and helping to prevent the collision, her second officer chose not to drop same and same was never dropped.[15] The courts below were persuaded to excuse and did excuse (on the basis of evidence of a negligent custom not to keep an anchor watch in the channel) the tanker from this additional fault on her part.

The District Court, in spite of all of the foregoing, exonerated the tanker and her owner, and the Fifth Circuit affirmed, resulting in a dismissal of the libel of these petitioners (innocent owners of cargo on the freighter) against the tanker and her owner.

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14. For some of this great mass of evidence, please see R. 1533, 1534-1535, 1536, 1596, 1677-1681, 1710, 1913, 1917-1918, 2009, 2200-2201, 2589, 2593-2595, 2624-2625 and 2640.

15. See Fact Finding 25 of the District Court on pp. 73a-74a of Appendix C.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with long-settled principles enunciated by the Supreme Court of the United States, if not with direct holdings of said Court, and the same is true with respect to principles and decisions of the United States Courts of Appeals for the Second, Third, Fourth and Sixth Circuits, to say nothing of the same type of conflict with previous principles and decisions of the Fifth Circuit.

2. The decision concerns extremely important questions in construction of the Inland (navigational) Rules of the Road and as such bears on the safe navigation of all vessels in the Inland Waters of the United States and the prevention of collisions thereof.

3. The decision is contrary to well-settled principles of maritime law and reaches an erroneous result.

1. *Conflict*

In the case of *The New York*, 175 U.S. 187 (1899), Mr. Justice Brown enunciated the following principles then and now well-settled in maritime law at pages 201 and 207 of the report:

> "Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, *or whose position or movements are uncertain*, she is bound to stop until her course be ascertained with certainty . . .

> "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." (Emphasis added.)

The foregoing principles were partially codified in the language of Rule III of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule III, quoted in Appendix A hereof, page 1a, infra. The precise language of the rule required the tanker in this case to sound the danger signal *immediately* upon experiencing doubt regarding the freighter. Such doubt was experienced at the time the freighter was seen in the bend in a position likely to sheer across the channel. According to the authorities construing Rule III of Article 18, the tanker also had the duty *immediately* to *stop and reverse her engines.* Had she done so, it is clear that the collision would have been completely avoided as stopping even 200 feet below the point of collision would have prevented the tanker from colliding with the freighter.

We respectfully submit that there can be no doubt that the movements of a vessel about to sheer are uncertain. When the other vessel is proceeding up a narrow channel at a speed of from 13 to 14 knots, with highly explosive cargo forward, as was the tanker in this case, and a meeting vessel appears about to sheer, there is then "uncertainty" and "anticipated danger" of the gravest character.

If any authority for the above propositions in addition to the literal language of the rule and the principles enunciated in *The New York*, supra, are required, same may be found in the following decisions from the other Circuits, with all of which the instant case conflicts in prin-

ciple, and with most of which it conflicts in specific holding:

(1) *The MUNAIRES*, 1 F.2d 13, 15 (2d Cir. 1924);
(2) *The CITY OF CHESTER*, 78 Fed. 186 (4th Cir. 1897);
(3) *The C. R. HOYT*, 136 Fed. 671 (D.C. N.J. 1905);
(4) *The E. J. BERWIND*, 74 F.2d 705 (2d Cir. 1935);
(5) *Tide Water Associated Oil Co. v. The SYOSSET, et al.*, 203 F.2d 264 (3d Cir. 1953);
(6) *Tank Barge Hygrade, Inc. v. The GATCO NEW JERSEY*, 250 F.2d 485 (3d Cir. 1957); and
(7) *Federal Insurance Company v. SS ROYALTON, etc.*, 312 F.2d 671, 676 (6th Cir. 1963).

Please see also the treatise *Griffin on Collision*, Section 256(f) and cases there cited.

For a recent case by the Fourth Circuit to similar effect, please see *Esso Standard Oil Company v. Tug MALUCO I*, 332 F.2d 211 (4th Cir. 1964).

The many Fifth Circuit decisions to similar effect are exemplified by the case of *Parker Bros. & Company v. De-Forest*, 221 F.2d 377 (5th Cir. 1955).

It is quite apparent from a consideration of the language of the District Court's opinion and that of the Circuit Court in the instant case that confusion arose in both courts as to what set of operative facts brings on the obligations of Rule III, both courts apparently being under the impression that there was no duty to act under Rule III until it is known that collision is "imminent" or that an "emergency" exists. See language of the District Court (R. 5127-5129) appearing at pages 71a-73a of Appendix C hereof and language of the Circuit Court appearing on pages 15a and 19a of Appendix B hereof. In any event,

the pilot of the tanker knew early that there was danger. See Appendix D hereof, an important excerpt (from R. 3544-3545, 3546-3547, 3548-3549, 3587-3591 and 3592-3595) from his testimony relied on by the lower courts in this connection.

It is clear from the above-cited cases and from *The New York* opinion of this Honorable Court, supra, that it is "danger of collision" or "risk of collision" that brings on the obligations of Rule III, rather than recognition of an "emergency" or "imminence" of collision. "Danger or risk of collision" has been defined by Judge Addison Brown in classical language in the case of *The AURANIA* 29 Fed. 98, 123 (S.D.N.Y. 1886) as follows: *"there is danger or risk of collision whenever it is not clearly safe to go on."* (Emphasis added.) This doctrine has been followed in many subsequent cases. For a recent case to similar effect please see *Ocean Marine, Ltd. v. United States Lines Company,* 300 F.2d 496, 498-99 (2d Cir. 1962).

We respectfully submit that the misapplication and resulting dilution of Rule III by the Courts below are alone sufficient to call for a review on a writ of certiorari.

In the case of *Construction Aggregates Co. v. Long Island R. R. (The SANDMASTER),* 105 F.2d 1009 (2d Cir. 1939), Judge Learned Hand (in strict accordance with the literal language of Rule I of Article 18 of the Inland Rules (33 U.S.C.A. Sec. 203, Rule I)) held at page 1012 of the report as follows:

> "Rule I also provides that when the positions are 'head and head', the signals shall be exchanged 'and thereupon such vessels shall pass on the port side of each other.' *In cases where any change of helm is necessary, this presupposes that the rudder shall not be moved until assent has been secured.* This is well-

> settled, when the proposal is for a starboard passing. * * * It applies a fortiori to a port to port passing, because some helm action is always then necessary before the vessels can 'pass'. The phrase 'and thereupon', indicates that they shall only put themselves in passing position after the exchange." (Emphasis added.)

To the same effect are the cases of *The RICHARD J. BARNES*, 111 F.2d 294 (2d Cir. 1940) and *James McWilliams Blue Line, Inc. v. Card Towing Line, Inc.*, 168 F.2d 720 (2d Cir. 1948).

The decisions by the courts below are in direct conflict with the holding in the *Construction Aggregates Co. (SANDMASTER)* case, supra, and we respectfully submit that this Honorable Court should declare the law on this point so that the circuits will not be in conflict. It is obvious from the facts as found by both the District Court and the Circuit Court that the tanker, at a time when those aboard her were uncertain that such a passing could be safely made, sounded one blast and turned right the amount sufficient to make a port-to-port passing without having received an assent to such a passing. The tanker did not carry the burden of showing that the above clear statutory violation could not possibly have contributed to the collision, as required by the holding in *The PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1874). It is quite apparent from the facts that the freighter was well over on her port side of the channel at the time of the collision, and there was space available to her starboard, which the tanker could possibly have used but for the fact that she had previously changed course to her right in violation of the above rule.

The Circuit Court below cited the case of *Royal Navy of Italy v. Standard Oil Co. of N. J.*, 27 F.2d 331 (5th

Cir. 1928), as authority for the proposition that a judicially-recognized custom in the Houston Ship Channel excused any violation of Rule I of Article 18 and required a port-to-port passing on the part of meeting vessels. However, an examination of this latter decision shows clearly that nothing in the custom or in the cited decision excused the vessels from first exchanging signals before either vessel moved her helm. In fact, the court in the *Royal Navy of Italy* case clearly states that the signals had been exchanged in that case. Any other requirement would be, we respectfully submit, in the teeth of the language of Rule I of Article 18.

The decision below cannot properly be distinguished from the above authorities, and, therefore, this Honorable Court should grant the writ of certiorari to resolve these conflicts and to restore these rules to their full strength for the prevention of collisions, not for the encouragement thereof.

2. *Importance*

A careful reading of the decisions of the courts below shows that both courts were greatly impressed (and rightly so) with the unseaworthiness of the Chinese freighter and the gross negligence of her owner and as a consequence likely were persuaded to ignore serious navigational faults of the Norwegian tanker. In excusing the tanker from the violation of Rule III of Article 18 of the Inland Rules and from the violation of Rule I of Article 18, the courts below have permitted a hard case to result in bad law. Safety principles developed by this Honorable Court over a long period of time and consistently followed by all of the circuits, including the Fifth Circuit prior to the instant case, are in jeopardy by reason of the laxity condoned in the instant case.

Furthermore, the lower courts in the instant case have excused the tanker for proceeding at night in the narrow Houston Ship Channel at full speed loaded with toxic and inflammable cargo without a lookout or an anchor watch on mere evidence of custom. In order to prevent future collisions of this character and magnitude, it is extremely important for this Honorable Court once again to declare the heretofore well-settled principle that evidence of a negligent custom is no excuse for conduct in accordance with the custom. See such cases as *A. H. Bull S.S. Co. v. Chesapeake S.S. Co. of Baltimore City,* 101 F.2d 599, 601 (4th Cir. 1939), where the Court, quoting in part from the opinion of the Fourth Circuit in *The Acilia,* 120 Fed. 455, 458 (4th Cir. 1903), said:

> ". . . 'Full speed in these dredged channels, when about to pass other vessels, is undeniably a fault which increases every risk of navigation. Appleby v. The Kate Irving (D.C.), 2 F. (919), 924.'
>
> "While, as stated by the judge below, it seemed to be the custom to violate this rule yet the fact that the rule was more honored in the breach than by observance does not justify its violation. Custom no matter how long persisted in cannot make dangerous procedure safe."

In addition to the foregoing, the lower courts excused the tanker for a failure to have any lookout, on a showing that it was *customary* on the vessel to excuse the lookout for a period of 10 minutes or so at the beginning of every hour so that the lookout might obtain coffee. This negligent practice should be condemned by this Honorable Court, particularly where as here the overwhelming weight of the evidence shows that a series of danger signals were blown by the freighter several minutes before the collision

and were not heard by those on the tanker. The courts below, to sustain this negligent practice, relied on mere negative evidence from persons on the noisy bridge of the tanker that the signals were not heard, to serve as a basis for a finding that they were not sounded. (On the other hand, the lower courts virtually admit the incorrectness of such a finding by granting a full recovery to the widow of the freighter's pilot, who was the person primarily, if not solely, responsible for failure to sound the danger signals, if they were not in fact sounded.) This Honorable Court should condemn this use of negative evidence, particularly where there was no one properly positioned to hear the signals, to excuse the negligent practice of failing to keep a proper lookout. This matter is of most serious importance for the safety of vessels under the following among other decisions of this Honorable Court:

(1) *Chamberlain v. Ward*, 62 U.S. (21 How.) 548, 570 (1859);
(2) *The ARIADNE*, 80 U.S. (13 Wall.) 475, 478 (1872); and
(3) *The OREGON*, 158 U.S. 186, 193 (1895).

It is also extremely important that this Honorable Court take direct issue with the lower courts in their holdings to the effect that an anchor watch need not be maintained in a narrow channel and that an anchor not only need not be used, but probably would be of no assistance, in stopping a vessel to prevent a collision. Such a holding certainly discourages a practice well-settled in law as a clear duty of a vessel to prevent a collision. See the cases of *The VIRGINIA*, 25 F.2d 623 (2d Cir. 1928), cert. denied, 278 U.S. 610; *River Terminals Corp. v.*

United States, 121 F.Supp. 98 (E. D. La. 1954); *Maribianca Navegacion, S.A. v. Panama Canal Company*, 182 F.Supp. 369 (D. Canal Zone 1956), affirmed, 298 F.2d 729 (5th Cir. 1962); and *Navegacion Castro Riva v. The M. S. NORDHOLM*, 178 F.Supp. 736 (E. D. La. 1959), affirmed, per curiam 287 F.2d 398 (5th Cir. 1961).

With the many navigational faults of the tanker in this case all being excused by the courts below, if the decisions below are permitted to stand, careless navigation will be encouraged and the Rules of the Road emasculated. This Honorable Court should grant certiorari to hold the tanker and her owner at fault and liable and thus maintain the applicable Rules of the Road in full force and effect to prevent collisions, as they were designed to do.

3. *Error in Decision Below*

As set forth above, the courts below both erred in interpreting the requirements of Rule III of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule III, and of Rule I of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule I. These matters will not be reiterated here, except to point out that the decisions below are clearly in error in their construction of the rules and in their holdings on the facts as found by them.

The following authorities show that the lower courts were also in error in excusing the negligent custom of proceeding at full speed in the narrow Houston Ship Channel at night:

(1) *United States v. Tank Vessel NORTH DAKOTA, etc.*, 208 F.Supp. 904, 906-07 (S.D. N.Y. 1962);

(2) *The Paris*, 37 F.2d 734 (S.D. N.Y. 1930), aff'd, per curiam on the District Court's opinion, 44 F.2d 1018 (2d Cir. 1930);

(3) *The George H. Jones,* 27 F.2d 665 (2d Cir. 1928), cert. denied, 278 U.S. 649;

(4) *Interlake S.S. Co. v. Great Lakes Transit Corporation,* 89 F.2d 694 (2d Cir. 1937), cert. denied, 302 U.S. 706;

(5) *Morrow S.S. Co. v. The Daniel J. Morrell, et al.,* 90 F.Supp. 300 (E.D. Mich. 1949), aff'd, per curiam, 182 F.2d 347 (6th Cir. 1950);

(6) *A. H. Bull S.S. Co. v. Chesapeake S.S. Co.,* 101 F. 2d 599 (4th Cir. 1939), rehearing denied;

(7) *Appelby v. Bark Kate Irving,* 2 Fed. 919 (D. Md. 1880);

(8) *W. E. Hedger Transportation Corporation v. Hart,* 163 F.2d 90 (2d Cir. 1947);

(9) *The San Simeon,* 63 F.2d 798 (2d Cir. 1933), cert. denied, 290 U.S. 643; and

(10) *Griffin on Collision,* Section 255.

Applicable here also is the following U. S. Engineers' regulation quoted in Appendix A, p. 2a hereof: 33 C.F.R. § 207.180(e)(3)(ii). Under all of the evidence and the above authorities, we respectfully submit that the great speed of the tanker was negligence and a proximate cause of the collision, and the courts below erred in not so holding.

For recent cases showing the serious error committed by the courts below in excusing the tanker for her failure to keep any lookout please see:

(1) *Circle Line Sightseeing Yachts, Inc. v. City of New York,* 283 F.2d 811, 814-15 (2d Cir. 1960);

(2) *Esso Standard Oil Company v. Oil Screw Tug MALUCO I,* 332 F.2d 211, 213-14 (4th Cir. 1964);

(Note: Please also see holding of this case regarding violation of Rule III of Article 18 on pp. 215-216 of 332 F.2d)

(3) *Gulf Oil Corporation v. The SOCONY NO. 16, et al.*, 162 F.2d 869 (2d Cir. 1947); and

(4) *Dwyer Oil Transport Co., Inc. v. Tug EDNA M. MATTON*, 255 F.2d 380 (2d Cir. 1958).

The cases showing the lower court's error on the anchor question appear under "2. Importance" above and will not be repeated here.

To assist admiralty courts in dealing with a situation where as here one vessel (the freighter) was unseaworthy and her owner grossly negligent and the faults of the other vessel (the tanker) may appear to have been less gross, this Honorable Court long ago created the doctrine of Major-Minor Fault. The tanker should at the very least be held liable under this doctrine to these petitioners as *innocent* owners of the freighter's cargo, and the lower courts most certainly erred in their failure so to hold. Please see the following cases:

(1) *The Michael Tracy (Cape Cod-Michael Tracy)*, 43 F.2d 965 (2d Cir. 1930), cert. denied, 282 U.S. 895;

(2) *O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp.*, 259 F.2d 11, 19 and n. 19 (5th Cir. 1958);

(3) *The Modemi*, 58 F.2d 916 (5th Cir. 1932);

(4) *Sir William Reardon Smith & Sons, Ltd. v. The Tug SAN PEDRO*, 226 F.Supp. 879 (S.D. Tex. 1962), affirmed, 328 F.2d 623 (5th Cir. 1964).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 29, 1966.

Respectfully submitted,

SWEENEY J. DOEHRING
Bank of the Southwest Bldg.
Houston, Texas 77002

E. V. GREENWOOD

JOSEPH NEWTON

NEWTON M. CRAIN, JR.

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI
Bank of the Southwest Building
Houston, Texas 77002

BLADES, CRAIN, SLATOR, WINTERS
& ROSS
San Jacinto Building
Houston, Texas 77002

APPENDIX A

STATUTES INVOLVED

The statutory provisions and regulation involved are:

(1) Rule III of Article 18 of the Inland Rules, 33 U.S.C.A., Sec. 203, Rule III, which reads as follows:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, for any cause, the vessel so in doubt shall *immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (Emphasis added.)

(2) Rule I of Article 18 of the Inland Rules, 33 U.S.C.A., Sec. 203, Rule I, which reads as follows:

> "When steam vessels are approaching each other head to head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and *thereupon* such vessels shall pass on the port side of each other." (Emphasis added.)

(3) Article 29 of the Inland Rules, 33 U.S.C.A., Sec. 221, which reads as follows:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of *any neglect to keep a proper lookout*, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (Emphasis added.) and

(4) 33 C.F.R., Sec 207.180(e)(3)(ii), which reads as follows:

> "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, . . . or any other manner of structure or improvements likely to be damaged by collision, suction or wave action."

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21367

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,

Appellants,

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(July 27, 1966.)

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

KILKENNY, District Judge: This is the story of another maritime tragedy resulting in heavy loss of life, severe personal injuries and property damage.

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* Of the District Court of Oregon, sitting by designation.

On November 7, 1961, about 11:00 P.M. the Chinese Ship M/V UNION RELIANCE (RELIANCE), was proceeding outbound, and the Norwegian Ship M/V BEREAN (BEREAN), which was inbound, collided on the east side of the Houston Ship Channel (Channel). The night was clear, the visibility good, with a northerly wind of approximately eight miles per hour. The ships caught fire, the fire aboard the BEREAN was extinguished within a matter of hours, while the RELIANCE remained ablaze, blocking the channel until November 10th when it was towed to and anchored in Galveston Harbor by the United States Corps of Engineers.

THE LITIGATION

After the towage, the United States filed a libel *in rem* against the RELIANCE, seeking the immediate sale of the vessel, the recovery of expenses incurred in removing the vessel from the Channel and in safe-guarding her while at anchorage. China Union Lines, Ltd. (China Union), owner of the RELIANCE, filed a petition for exoneration, or limitation of liability, and obtained the customary order prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding. In the petition, China Union elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. The court appointed a salvage master and authorized him to undertake the steps necessary to extinguish the fire in the vessel's holds and bring her to port to discharge the remaining cargo, preparatory to sale.

In other proceedings, in the same court, China Union filed its libel against the BEREAN. A. O. Andersen & Co. (Andersen), the owner of BEREAN, appeared, claimed the vessel and answered in cross-libel against China Union.

Mitsubishi International Corporation, et al, (Mitsubishi), the owners and underwriters of the lost and damaged cargo aboard the RELIANCE, filed a libel against BEREAN and her owner. Likewise, American Cyanamid Company (Cyanamid), the owner of the only cargo lost aboard the BEREAN filed its libel against the RELIANCE. The Consul General of the Republic of China (Consul General), sought recovery for the injuries to, and deaths of, the officers and members of the crew (Lan Jing-Chau) of the RELIANCE against both vessels. Lucy Duncan (Duncan), as widow, executrix and sole beneficiary of Captain Duncan, channel pilot, also killed as a result of the collision, sought recovery against RELIANCE and her owners.

Separate libels were filed directly against Cyanamid, as owner of the BEREAN cargo, by China Union; the owners and underwriters of the cargo aboard the RELIANCE, and various other parties. These libels were filed on the theory that the acrylonitrile carried by the BEREAN, was of such a dangerous nature and propensity as to render the shipowner liable to said parties.

This complexity of libels, with its jungle of issues, was wisely consolidated by the trial judge (judge). Prior to trial, and after hearing, the judge directed payment of certain salvage claims and deferred action on the remainder of such claims pending a decision on the issues of liability.

After trial, and the entry of detailed findings and conclusions, the judge entered an interlocutory decree directing, among other things, that:

(1) the petition of China Union for exoneration from, or limitation of, liability be denied;

(2) reimbursement be made to the trustee, out of

funds in the Registry of the Court, for the trustee's reasonable expenses, including trustee and attorney fees;

(3) payment be made of the claim of the United States from funds remaining in the Registry of the Court in the sum of $27,219.38, with interest;

(4) China Union recover nothing from the cargo of the RELIANCE as general average;

(5) the order theretofore entered enjoining prosecution of litigation against China Union on any claim growing out of the collision be vacated;

(6) China Union recover nothing against respondent Andersen or the BEREAN, that its libel be dismissed with costs and that Andersen, as cross-libelant, recover from RELIANCE and cross-respondent, China Union the damages sustained by it in consequence of the casualty;

(7) Mitsubishi, and other such libelants, the owners of parcels of cargo on the RELIANCE, recover nothing against the BEREAN or her owner Andersen or Cyanamid, and that such libel be dismissed with costs;

(8) Cyanamid recover from the RELIANCE and her owner China Union the damages sustained in consequence of the casualty, and that the cross-libel by China Union against Cyanamid be dismissed with costs, together with any other intervening libels or cross-libels against that company be dismissed;

(9) the Consul General, representing the next of kin of the dead Chinese seamen and those that were injured, recover nothing against BEREAN or Andersen and that the libel be dismissed;

(10) the representative of the deceased and injured crewmen recover from the RELIANCE and her owner

China Union, all damages sustained by each of them, less one 15% reduction for contributory fault.

(11) Lucy Duncan, the surviving wife of Captain D. O. Duncan, recover from the RELIANCE and her owner China Union, such damages as sustained by reason of the death of her husband.

(12) Armement Deppe, owner of the SS LUXEMBOURG, recover nothing from the BEREAN or her owners Andersen & Co.

China, Mitsubishi, the Consul General of the Republic of China, and Armement Deppe, S.A. appeal

FINDINGS

The detailed findings and conclusions of the judge occupy twenty-five pages of the record. Putting aside certain background material and formalities of no particular significance on this appeal, the judge, after a trial of approximately one month, found that the following facts, with others to be later discussed, were supported by substantial evidence.

THE VESSELS

The RELIANCE was a steel motor ship, built in the United States in 1940, approximately 496 feet in length and designed for the carriage of dry cargo. The ship's engines were designed to give approximately 240 revolutions per minute which, with the existing gear ratio should give approximately 80 revolutions per minute to the shaft. However, by reason of age, wear and poor maintenance, the engines were not capable of producing this efficiency. To change the direction in which the power is imparted to the propeller shaft, it was necessary to stop the engines by

cutting off the fuel supply, then change the cam setting and restart the engines. The design permitted and, for that matter, contemplated one pair of engines to be kept running ahead and the other pair to be kept running astern at all times while the vessel was in pilot waters. When desirable all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was neither a difficult nor a time consuming operation and could be accomplished by competent engine room personnel in a matter of approximately one minute. She was equipped with a hydraulic steering system, located in the steering engine room, not in the main engine room. Hydraulic rams, equipped with fluid under great pressure, actuated the rams and served to move the rudder in the desired direction. Two separate steering systems were available to force the fluid through the system and against the rams, while one was in use the other served as a stand-by. The principal unit of the steering system was a large pump powered by an electric pump utilizing a 50 h.p. electric motor. A number of auxiliary pumps and motors were available, but only a so-called "replenishing" pump was of any importance. In normal operation the hydraulic fluid escaped from the system and was collected in the sump tank, then lifted by means of the "replenishing" pump to an overhead replenishing tank from which, by gravity, it was fed back into the system for further use. This pump was powered by a small electric motor. Approximately 35 gallons of fluid was required to fill each system. While minor leaks were expected, in normal operation only small quantities of fluid should be required at quite infrequent intervals.

The BEREAN was built in Norway and delivered to her owner in April, 1961. She was 508 feet in length,

powered by one 9000 h.p. diesel engine. Her navigating bridge is in the forward part of the afterhouse, some 350 feet from the bow. Her cargo space is divided into 42 tanks, designed and equipped to carry many varieties of bulk liquids. She had been engaged in the chemical trade for several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The skin of the ship constituted the outer wall of certain of her wing tanks. These tanks were not protected by cofferdams or other protective voids.

CARGOES AND MOVEMENTS PRECEDING THE CASUALTY

Following her purchase in April, 1961, from Greek interests, the RELIANCE sailed from Greece, through the Mediterranean to Tampa, Florida, and thence to New Orleans. There, her captain and crew had full knowledge of the fact that extensive repairs were needed in the engine room, in particular the overhaul of the engine control department. An officer of the petitioner and a marine surveyor flew from New York to New Orleans to supervise these repairs. While those repairs were underway, the main engines were opened and found badly worn and eroded. Since repairs were not readily available the old heads were re-installed. A full report was made to the owners of the work and other work which was recommended by the marine surveyor to place the engine room in proper condition. Departing New Orleans the RELIANCE proceeded to Houston, thence through the Panama Canal, thence to Japan and Taiwan, where additional engine repairs were made. There, her captain, chief engineers and others of her crew were replaced and the officers and crew who were

aboard at the time of the casualty took over. She discharged a part of her cargo at Los Angeles and there received five of the number of piston heads that were needed to properly repair her main engines. However, the heads were not installed. She arrived in Houston on November 5th, discharged part of her cargo and left the Houston dock at 6:30 P.M. November 7th. Unassisted by tugs, she proceeded outbound, with Channel pilot Duncan at her bridge. At approximately 8:30 P.M. while she was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system, which was in use at the time. The engines were stopped, the anchors were dropped and the vessel brought to rest. Both the starboard and port steering systems were disconnected. After a test had shown that the port system was operating properly, the anchors were lifted and the vessel got underway at approximately 9:00 P.M. Her crew then attempted to repair the starboard steering system. On examination, it was found that the brushholder on the electric motor which operated the starboard steering pump was out of order. The chief electrician repaired the damaged part, but did not replace the part in the engine. As a result, the starboard steering system was not thereafter in operation. Apparently the port steering system was functioning properly until she started across the channel.

On November 6, 1961, the BEREAN loaded 1400 tons of acrylonitrile in Good Hope, Louisiana. The officers of the vessel directed that the cargo be placed in the forward most cargo tanks. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. A distinguishing feature is that it gives off highly toxic fumes. The fumes, in relatively weak concentrations, will cause illness to a person exposed over a long period of time. A single exposure may

cause illness or death if there is a sufficiently high concentration of the material. The symptoms of poisoning are similar to those of cyanide. Under Coast Guard Regulations (Regulations) acrylonitrile was, at the time of the casualty, and still is, classified under Regulations as a Grade C flammable fluid, as is gasoline, benzine, naphtha and other such products. The BEREAN also carried a mixed cargo of other bulk liquids. She arrived at Galveston Bar at approximately 9:15 P.M. on November 7th. Channel pilot Lary boarded her and assumed active control of her navigation as she proceeded inbound toward Houston.

From the sea buoy to the point of collision, and beyond, the channel passes through the open waters of Galveston Bay. The channel was dredged to a depth of 36 feet and a width of 400 feet, and is relatively straight as it crosses the Bay. It was the custom and practice of most vessels, in favorable weather, to navigate this portion of the channel at "full ahead," except when passing other ships. From the sea buoy to the point of collision, pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a major portion of the time, although he was in his cabin before the emergency. He returned to his bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour. It was his duty to proceed to the bow of the ship to serve as a lookout for another hour, before returning to duty at the wheel. However, when weather and visibility were good and the vessel was proceeding routinely, it was the custom and practice for the helmsman to have a 10 to 15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose. Normally, in passing through the area being navigated by the BEREAN, it was not customary to have an anchor

watch standing by, in that there was no occasion to use an anchor to maneuver until after reaching Morgan's Point, some distance inward.

THE COLLISION

The RELIANCE was navigating at a speed of 9-10 knots over the ground, when she made the bend at Five Mile Point. Each vessel saw the lights of the other about that time. BEREAN blew a one blast signal, which was not answered by RELIANCE. In negotiating the bend, RELIANCE navigated somewhat to her starboard side of the channel. The pilot of the BEREAN noted and commented upon this maneuver. However, the maneuver was, to them, of little significance and did not cause the vessel to sheer away from the starboard bank, nor did it result in loss of control of her steering. In making the turn the RELIANCE pilot ordered her rudder five degrees to port. The rudder responded to the movement of the wheel and the vessel started to turn to port. At this highly important point, the steering gear of the RELIANCE failed; with the frozen rudder in a five degree port position. The quartermaster was unable to move the wheel in either direction and she continued to swing under that rudder setting. Thereafter, she did not straighten her course. After her captain, pilot and quartermaster determined that the wheel would not respond, her bridge notified the engine room to reduce speed and shortly thereafter to stop. On watch was the third mate who was ordered by the captain to find the chief engineer and advise him of the rudder failure. Her engine room was directed to give full speed astern. The pilot of the RELIANCE, recognizing the imminent danger, ordered her first starboard anchor to be dropped and shortly thereafter ordered her port anchor dropped. At this point, approxi-

mately 11:00 P.M., the RELIANCE sounded three blasts on her whistle. This was the only wistle signal she sounded. Efforts to transfer the steering control on her bridge from the telemotor system to the gyro-pilot failed and she continued to swing to her port, completely out of control. Prior to the emergency the RELIANCE'S four engines had all been coupled for maximum forward speed. Under orders for full power astern, the engine room reversed one set of two engines and coupled the same to the propeller shaft to give astern power. This, however, did not control the vessel's swinging to port, with some headway and she continued to have headway until she collided with the port side of the bow of the BEREAN. The remaining two engines were never reversed and coupled to the shaft. The other findings, with reference to fault, lack of fault, privity and other issues, we shall discuss in connection with the assignments of error.

CREDIBILITY OF WITNESSES

The judge noted that several of the principal witnesses for the petitioner were impeached in connection with subjects of great importance. He pointed to the withholding of an important report by the petitioner, which report had received the approval of the captain. The report was entirely inconsistent, in a number of important respects, with the theory advanced by the RELIANCE. He also pointed to the impeachment, on important testimony, of the chief engineers and chief electrician of the RELIANCE.

ASSIGNMENTS OF ERROR

Putting aside, for later discussion, the claims against Cyanamid and the claim of the United States, we summarize the assignments of error in the ensuing fashion:

I. That the judge erred in exonerating the BEREAN, because the record shows that she failed to stop, blow proper signals or proceed with caution after she first recognized that there was a risk of collision.

II. That the judge erred in exonerating the BEREAN, when the record shows that she failed to proceed at a moderate rate of speed on meeting a vessel that she was to pass.

III. That the judge erred in exonerating the BEREAN, when the record shows that she failed to keep a lookout on the bow or a proper lookout on the bridge.

IV. That the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

V. That the judge erred in exonerating the BEREAN, when the record disclosed that she was unseaworthy and at fault for transporting a poisonous, explosive and flammable cargo in her forward wing tank, next to the skin of the ship.

VI. That the judge erred in denying petitioner limitation of liability under 46 U.S.C. § 183 (a), against all claims made against it.

VII. That the judge erred in holding the petitioner and RELIANCE liable for loss and damage by fire to the RELIANCE cargo, because the fire originated from the other vessel and because petitioner, as a carrier, was exempt from such liability under the Bills of Lading and by virtue of 46 U.S.C. § 1304 (2) (b), and 46 U.S.C. § 182.

ASSIGNMENT I

I. On this assignment, appellants charge that the BEREAN violated two of the Inland Rules[1] in failing to stop, blow proper signals or proceed with caution after she first recognized, or should have recognized, that there was a risk of collision.

It is contended that the BEREAN violated Rule I, when she (1) blew a one blast signal, proposing a port-to-port passing at a time when those in charge were in doubt as to the feasibility of such a passing, and (2) turned right two or three degrees before receiving a reply to her one blast signal. Rule III was violated, say appellants, when the BEREAN failed to blow a danger signal and reverse her engines immediately upon seeing the RELIANCE in a position that might force her to sheer across the channel. Practically all of appellants' arguments on this assignment are based on an assumption that the RELIANCE, did sheer off its starboard bank and that such fact was observed, or should have been observed, by Pilot Lary of the BEREAN. The judge saw and observed the witnesses and chose to believe Lary's version of what occurred and the reasons for his action, or lack of action, at the time. While Lary observed the position of the RELIANCE when the vessels were approximately one mile apart, he had no feeling that a collision was imminent until he heard the whistles of the RELIANCE and the sound of the anchor letting, at which time he recognized an emergency and gave a full speed astern on the BEREAN'S engines and a hard right rudder to put her aground in the mud bank at his starboard side of the channel. On these issues, the judge found that each vessel saw the other when the RELIANCE was making the

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1 33 U.S.C. § 203, Rule I.
33 U.S.C. § 203, Rule III.

bend at Five Mile Point, at which time they were approximately three miles apart. The BEREAN blew a one blast signal which was not answered by the RELIANCE. In negotiating the turn the RELIANCE navigated somewhat to the starboard side of the channel. This maneuver was noted and commented upon by Lary, but he considered it of little consequence. The maneuver did not cause the RELIANCE to sheer away from the starboard bank, did not cause loss of control of steering and did not precipitate the casualty. Prior to sighting the RELIANCE, approximately three miles away, the BEREAN had been navigating at "full ahead" and making thirteen to fourteen knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to one-half and shortly thereafter to "slow ahead." It was at this time that the one blast signal was given by BEREAN. While the one blast signal was not answered, Lary fully expected to make a normal port-to-port passing. He was somewhat apprehensive after watching the RELIANCE swing to port and turned the BEREAN slightly to starboard, still expecting to negotiate the port-to-port passing. Lary's order for full speed astern on the BEREAN'S engines and a hard right rudder were put in immediate effect. At this time the vessels were approximately one-fourth of a mile apart and closing on each other. The judge found that the BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger that the BEREAN was not at fault in failing to undertake a starboard-to-starboard passing. The judge found that she had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed in which such a passing might have been accomplished in safety. These findings are fully supported by the record and, in particular, by the testimony of the Pilot Lary

and the Mate Haugen. The piercing searchlight of hindsight, so skillfully employed by counsel for appellants, may point to other maneuvers that might have been taken successfully by the BEREAN. However, both we, and the judge, must interpret the record from the viewpoint of a prudent pilot under the circumstances then and there existing. Lary's conduct must be judged with reference to the circumstances at the time and not by a cool estimate of possible danger which might be formed after the event.

It is conceded that vessels, in this channel, are required to pass port-to-port—that meeting vessels must approach each other and pass by turning to starboard two or three degrees. This is in line with a judicially recognized custom in the channel. *Royal Navy of Italy v. Standard Oil Co. of N.J.*, 27 F.2d 331 (5th Cir. 1928). The cases cited by appellants, on this assignment, simply do not support their position. For example, the decision in *THE SANDMASTER*, 105 F.2d 1009 (2d Cir. 1939),[2] dealt with a situation where the Inland Rules and a special statute were confused by the pilot; this confusion led to a collision involving three vessels. The judge there held that the narrow channel rules did not apply to a section of the East River, near Brooklyn Bridge, but that navigation in that section was governed by the East River Statute. Obviously, that decision is of no assistance. On the other hand, the case on which the lower court and BEREAN rely, *VICTORY-PLYMOTHIAN*, 168 U.S. 410 (1897), is of compelling significance. The facts in that case are almost identical with the facts in this record. A lengthy discussion of that decision is unnecessary. It is enough to say that the decision

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[2] For factual statements see District Court opinion, 26 F. Supp. 64. This decision is reported **sub nom Construction Aggregates Co. v. Long Island R. Co.**

is in full and complete support of the findings and conclusions of the judge on this issue. Other cases cited by appellants, such as *RICHARD J. BARNES,* 111 F.2d 294 (2d Cir. 1940); *A. H. Bull v. United States,* 34 F.2d 614 (2d Cir. 1929); *MELROSE-SANDCRAFT,* 237 F.2d 884 (2d Cir. 1957), and others, involved crossed signals or a change of course of one of the vessels. Those cases are no more in point than the *SANDMASTER, supra.* We conclude that the findings and conclusions of the judge, on this issue, are supported by substantial evidence.

ASSIGNMENT II

Appellants charge BEREAN with failing to proceed at a moderate rate of speed on meeting the RELIANCE, in violation of 33 C.F.R., § 207.180 (e) (3) (ii).[3] Appellants theorize that the BEREAN kept traveling at full speed ahead long subsequent to the time when, on seeing the RELIANCE in a position on the bend from which it was likely to sheer, she should have reduced her speed and reversed her engines. The judge's findings are in direct conflict with appellants' assertions. He found that the BEREAN observed the RELIANCE as she was in the turn of the channel about three miles away. Prior thereto, the BEREAN had been navigating at full ahead, or approximately 13 to 14 knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to "one-half" and shortly thereafter to "slow ahead." At this time the BEREAN gave the one blast signal, which was not answered by the RELIANCE. True enough, the pilot and watch officer of the BEREAN observed the RELIANCE somewhat close to her

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[3] "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, ..."

starboard bank of the channel and watched her swing to port, at which time they became somewhat apprehensive. The BEREAN, at this time, turned slightly to starboard. However, it was not until the BEREAN heard the three blast signal from the RELIANCE, and heard the sound of the anchor letting go, that the pilot of the BEREAN recognized an emergency. He forthwith blew three blasts in return, immediately ordered full speed astern on the BEREAN'S engines and gave her a hard right rudder, intending to put her aground. Compliance with these orders was immediate. The vessels were then closing on each other. There is nothing in the record on which the judge could find that a speed of 13 to 14 knots was not proper in the Channel. For that matter, appellant Mitsubishi practically concedes that such a speed below Morgan's Point would not be a negligent act. In any event, the district court has resolved the issue against the appellants and, in our view, such a resolution is not clearly erroneous. A prudent speed, under the circumstances, was an issue of fact for the judge, *Socony-Vacuum Oil Co. v. Smith,* 179 F.2d 672 (5th Cir. 1950).

Appellants' citations do not fit our facts. For instance, take *WM. A. PAINE,* 39 F.2d 586 (6th Cir. 1930), cited by China Union in support of its contention that BEREAN was guilty of statutory fault in proceeding at 13 to 14 knots. The *PAINE* involved an interpretation of certain regulations governing the speed of vessels through Maumee Bay Channel in the Great Lakes area. The regulation prescribed a speed of 10 miles per hour. Here, our regulation makes no mention of a maximum speed. There is no statutory speed limit in the channel applicable to the area of the collision. At the time of the collision in *DITMAR KOEL,* 65 F.2d 555 (5th Cir. 1933), the rules and regulations governing the use of the channel provided for a maximum

speed of 8 miles per hour. There, the judge held that a speed of 9 knots was excessive and this circuit upheld that finding. The statutory speed of 8 miles per hour was repealed by the adoption of the present rules. Additionally, the channel has been enlarged in depth and in width since the DITMAR KOEL decision.

Since we cannot say that the findings of the judge were clearly erroneous, we are governed by them. *Atkins v. Lorentzen,* 328 F.2d 66 (5th Cir. 1964). The decision in *GEORGE H. JONES,* 27 F.2d 665 (2d Cir. 1928), does not nullify the force or effect of the judge's findings against appellants on this issue.

ASSIGNMENT III

Appellants say that the BEREAN failed to keep a proper lookout from the bridge, as well as from the bow, and in so failing, violated Article 20 of the Inland Rules, 33 U.S.C. § 221.[4] On this issue, the judge found that the BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 P.M. until the time of the collision. After so finding, the judge went on to hold that this failure did not cause, and could not have caused or contributed to, the collision. The judge found that Pilot Lary saw the RELIANCE several miles away and observed her lights constantly thereafter, and that, by reason of his familiarity with the channel, he recognized the danger at the earliest possible moment, under the then existing circumstances. He heard the only whistle given by the RELIANCE and

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[4] "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry light or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

took immediate action. During this period, Pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a majority of the time. He had gone to his cabin shortly before the emergency and returned to the bridge only moments before the collision. It was the helmsman's duty to proceed to the bow of the ship to serve as a lookout for one hour after being relieved at the wheel and before returning to duty. However, a general practice was followed on the BEREAN, which permitted the helmsman a 10 to 15 minute coffee break after leaving the wheel and before proceeding to the bow, if weather and visibility permitted and the vessel was proceeding routinely. It was during this interval that the emergency arose. Both bow anchors of the BEREAN were ready to let go, but she had no one standing by the windlass to serve as an anchor watch. By reason of the nature of the channel in that area, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point. Other findings go into considerable detail on the issue of lookout.[5] The judge found that a lookout "could have done nothing more" than was done by the pilot of the BEREAN under the same circumstances and conditions.

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[5] "16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour."

"21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE."

"37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger."

Appellants' proctors, again in the brilliant light of considered hindsight, have carefully reconstructed the events leading up to the collision and argue that Pilot Lary could not have seen what happened and that the absence of a bow lookout was, in fact, causative. It is fundamental that the judge did not have to accept a theory adopted by counsel, as against the positive testimony of Pilot Lary, the watch officer Haugen and tug captain Starkweather. It is argued that the location of the RELIANCE'S anchors, following the collision, demonstrates that she moved extremely close to her port bank at the time her star-board anchor was dropped and that she then moved back toward the center of the channel before the port anchor was dropped. This argument shows the resourcefulness of appellants' proctors, but it does not prove that a bow lookout would have been of aid to the BEREAN. Obviously, the judge had more faith in the channel course, as shown by the RELIANCE'S instruments, than in post casualty theories, advanced by proctors. Furthermore, the judge could well have believed the testimony that the position in which the starboard anchor was found did not indicate that this was the position of the anchor at the time it was first dropped. Again, we observe that the judge had an opportunity to see and observe the witnesses. We are satisfied with his analysis of the evidence. His finding that the failure to have a lookout did not cause and could not cause or contribute to, the collision is supported by substantial evidence.

THE PENNSYLVANIA, 86 U.S. (19 Wall, 125 (1873)), and other cases cited by appellants, do not compel a different result. Appellants would have us give birth to a rule, that every vessel guilty of a statutory fault has the burden of establishing that its fault could not, by

any stretch of the imagination, have had a causal relation to the collision, no matter how speculative, improbable or remote. *THE PENNSYLVANIA* does not go that far and this court so stated in *Compania De Maderas v. THE QUEENSTON HEIGHTS*, 220 F.2d 120 (5th Cir. 1955), *cert. denied* 350 U.S. 824 (1955). Appellants reliance on *G. B. Zigler Co. v. Barker Barge Lines*, 167 F.2d 676 (5th Cir. 1948), and *Smith v. Bacon*, 194 F.2d 203 (5th Cir. 1952), place them on tenuous grounds. The decisions in *Zigler* and *Bacon* have been molded and placed in proper perspective by later decisions in *Parker Bros. & Co. v. De Forest*, 221 F.2d 377 (5th Cir. 1955), and *Atkins v. Lorentzen, supra.* Nor can appellants go outside the circuit and find comfort in authorities such as *Esso Standard Oil Co. v. THE MALUCO*, 332 F.2d 211 (4th Cir. 1964), or *Circle Line Sightseeing Yachts, Inc. v. City of New York*, 283 F.2d 811 (2d Cir. 1960). In *MALUCO* the pilot, in contrast to our situation, could not see the lights or maneuvers of the approaching vessel. If, in *MALUCO*, the judge had found that the pilot of the vessel saw everything which a bow pilot lookout could have seen, undoubtedly, the Fourth Circuit would not have reversed. The basic holding in that case was that the tug's general lookout was inadequate and that a special lookout was needed.[6] The most that can be said of *MALUCO* is that failure to maintain a lookout is not the equivalent of statutory fault, but does give rise to a strong influence that such failure contributed to the incident and imposes on the vessel a heavy burden to show, by clear and convincing evidence, that it did not so contribute. Here, the judge's findings and conclusions were within the permissible limits of that deci-

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[6] "But if a special lookout was not needed, the tug must plead the adequacy of her general lookout in order to meet her burden." 332 F.2d 214.

sion. We feel that the decision of the same circuit in *United States v. SS SOYA ATLANTIC,* 330 F.2d 732 (4th Cir. 1964) (1964 A.M.C. 898, affirming 213 F. Supp. 7, 1964), rendered a few days after *MALUCO,* is more applicable to the case before us. There, the court held that the district court findings were binding unless clearly erroneous and that the absence of a lookout, having no other duties, is not a basis for a finding of fault if the bridge actually observes what a lookout should have seen. One of appellants urges that no one abroad the BEREAN was serving as a lookout solely in such capacity and without other duties to distract him. *Circle Line Sightseeing Yachts, Inc. v. City of New York, supra,* is cited. The distinguishing feature of *Circle Line* is that the lower court failed to make a finding on whether the lookout, with no other duties, could have seen the bridge earlier and either avoided the accident or, at least, diminished its severity. Here, as previously mentioned, the trial court found, as a fact that the absence of a bow lookout not only did not cause the collision, but could not have caused or contributed to it.

A discussion and analysis of other cases cited by appellants, such as *THE OREGON,* 158 U.S. 186 (1895); *THE FELIX TAUSSIG,* 5 F.2d 612 (9th Cir. 1925), *cert. denied* 269 U.S. 560 (1925); *Poling Russell Inc. v. United States,* 196 F.2d 939 (2d Cir. 1952), and *River Terminals Corp. v. United States,* 121 F. Supp. 98 (E.D. La. 1954), would add nothing to the enlightment of the profession nor to the validity of our conclusions.

The question of a proper lookout is one of fact to be determined from all of the circumstances on the basis of common prudence, there being no fixed requirement that a vessel maintain a "bow lookout" under the facts and cir-

cumstances here presented. The finding of the trial judge on this issue was clearly within the realm of reason. The evidence established beyond doubt that the absence of the bow lookout had nothing whatsoever to do with the collision.

ASSIGNMENT IV

The appellants claim that the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

The record supports the judge's finding that the BEREAN was not at fault in failing to have an anchor watch prior to or at the time of the collision, or in failing to drop her starboard anchor as ordered by her pilot. The evidence is clear that it was not the custom of the ships to maintain an anchor watch in the portion of the channel in question, particularly when the vessel had sufficient power, as the BEREAN had, to readily maneuver. Furthermore, the judge found that even if the anchor of the BEREAN had been dropped when her pilot ordered, this procedure would have had little, if any, effect on slowing the vessel and would not have prevented the collision. In other words, BEREAN took the quickest and most certain method of losing headway by running aground. The record shows, and the judge found, that when the BEREAN'S pilot recognized the emergency and ordered the engines full astern and a hard right rudder, he likewise ordered the starboard anchor dropped. The starboard officer who was on the bridge with the pilot immediately started to obey the order. Before he reached the bow he felt the BEREAN go aground and observed the RELIANCE bearing down on the port bow of his vessel in a manner which presented an inevitable collision. For that reason, he did not try to drop the anchor.

The BEREAN ran aground on her starboard side of the channel, either immediately before or at the time of the impact. At such time, she had little, if any, headway. Likewise, the RELIANCE had lost most of her speed at this time. Appellants' argument that if the BEREAN had an anchor watch, he could have forthwith dropped the anchor and thus stopped the BEREAN and avoided the collision, is directly opposed to the findings of the judge. There is little, if any, evidence to support this argument. For that matter, the great weight of substantive evidence is against such a contention. The dropping of an anchor when a vessel is making 8 or 9 knots would, on the record, violate good seamanship. Most of the experts were of the view that the dropping of an anchor or anchors from a vessel proceeding to five knots or more, with a view of stopping or even slowing the vessel, would be highly dangerous and probably futile. Such a maneuver would burn the brake bands and at a speed of 8 to 10 knots would result in breaking the anchor chain. No witness testified that he ever dropped an anchor under such circumstances. The expert testimony on this subject was not only convincing, but was in line with what would seem to be good common sense.

Typical of the cases cited by appellants are *THE VIRGINIA*, 25 F.2d 623 (2d Cir. 1928); *River Terminals Corp. v. United States, supra,* and the *Mariblanca Navegacion, S.A. v. Panama Canal Co.*, 182 F. Supp. 369 (D.C. C.Z. 1956), *aff'd.* 298 F.2d 729 (5th Cir. 1962). As applied to the facts of this cause, those cases give us nothing of substance. *Mariblanca* involved a defective steering gear and failure to drop anchors in the Panama Canal. That area is governed by a specific statutory requirement that

anchors be in a state of readiness for letting go.[7] There, the judge held that the accident was caused by a failure of the vessel's steering mechanism and by failure of the vessel's personnel to promptly execute the orders of the pilot with respect to the engines and anchors. In the final analysis, this case merely stands for the proposition that an appellate court will not set aside the finding of a judge unless "clearly erroneous." *THE VIRGINIA* involved a "comedy of errors." The third officer was sent forward to let go an anchor, but dropped the wrong anchor. This required the third officer to run forward to the forecastle head and drop anchor. This he did, but dropped the starboard instead of the port anchor thereby pulling the vessel so that she sheered directly toward the ship with which she collided. The appellate court, on this issue, merely affirmed the finding of the judge. Following the same pattern is the decision in *River Terminals Corp., supra.* There, the judge found that the dropping of anchors might have avoided the collision—that the failure to drop them was at least a factor contributing to the casualty.

A discussion of other cases cited by appellants would only lengthen an opinion which, with much left to be said, is already beyond the Pale.

ASSIGNMENT V

China Union, and Lan Jing-Chau, et al, charge that the BEREAN was unseaworthy by reason of dangerous cargo being placed in a forward wing tank, next to the skin of the ship. This assignment is related to, but must be distinguished from, the assignment of these appellants that Cyanamid was at fault in failing to warn the BEREAN of

[7] 35 C.F.R. 4.41.

the lethal qualities of the cargo. Later, we shall treat of that charge and of China Union's standing to raise these questions.

As early as 1871 the Congress took an interest in legislation on dangerous articles or substances in commerce.[8] The legislation in effect at the time of the casualty[9] empowered and directed the commander of the Coast Guard, in order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances, to, by regulation, define, describe, name and classify all explosives or other dangerous articles or substances and to establish such regulations as might be necessary to make effective the provisions of the section with respect to the descriptive name, etc.[10] The legislation further provided that the transportation, stowage or use of such articles or substances should be in accordance with the regulations. These statutes, and the regulations promulgated thereunder,[11] make it clear that the duty is placed on the Coast Guard to properly examine, analyze and classify all cargoes such as the one here in question. It did so examine this type of cargo and classified it as Grade C flammable liquid, it being placed, as previously mentioned, in the same clasification as gasoline, benzine, naptha and other such substances.[12] It was not classified as a poison either "extremely dangerous" or "less dangerous,"[13] or with having lethal characteristics. It has been said, and rightfully so,

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8 16 Stat. 440.

9 46 U.S.C. §§ 170, 170 (a), 170 (b).

10 46 U.S.C. § 170 (7) (a).

11 46 C.F.R. 146.01.

12 45 C.F.R. 146.21-100.

13 46 C.F.R. 146.25-5; 146.25-10.

that these statutes and the regulations promulgated thereunder amount to much more than a set of prohibitions with punitive sanctions. They establish a standard of care. *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964).

The judge found that the BEREAN was not at fault in carrying acrylonitrile in her forward wink tank. The ship had been engaged in the chemical trade for several months following her construction, and prior to the collision carried various kinds of petroleum products and other flammable liquids in her forward wing tanks. The shell, or skin, of the ship constitutes the outer wall of certain of her wing tanks. No protective cofferdams or voids surrounded these tanks. Under pertinent Regulations those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics."[14] Acrylonitrile is similar to gasoline in its burning and explosive characteristics. In addition, it is toxic, and gives off poisonous fumes. These fumes cause illness to persons exposed thereto in relatively weak concentrations over a prolonged period of time and may cause illness or death from a single exposure if in a sufficiently high concentration. Symptoms of this poison are similar to those of cyanide.

Appellants claim that the Coast Guard was in error in not classifying acrylonitrile in the same classification as poisonous gases, or with those having lethal characteristics, as to which different regulations apply. It is said that such a cargo should not be carried in the forward tanks, or that a cofferdam or void space should have been provided between the tank and the skin of the ship. A rule that this type of material should not be carried in the forward tanks of the

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14 46 C.F.R. Part 39.

vessel would probably destroy a substantial segment of the carrying capacity of most tankers. The fact, if it be a fact, that "a large majority of collisions are on the bows of vessels" does not mean that the forward part of a vessel should not be used for the purpose of transporting liquids such as acrylonitrile. No custom or usage is advanced to support this argument. No Regulations were violated by placing the cargo in the forward tanks. For that matter, the regulations of the Coast Guard invited the procedure which was followed by BEREAN in the stowage of this cargo. The charge that the cargo should have been stowed in tanks with a cofferdam, or void, apparently was suggested by a Regulation covering the stowage of "flammable or combustible liquids having lethal characteristics." The appellants concede that the Regulations, in effect at the time of the casualty, did not classify the chemical as a flammable or combustible liquid having lethal characteristics.

The Regulations properly distinguish between a chemical which is highly flammable and a chemical which is highly toxic or one having lethal characteristics. Of course, a chemical may be both flammable and toxic and, if sufficiently toxic, should be placed in a different classification than one which is only flammable. To be kept in mind is the fact that the Bill of Lading issued by Andersen to Cyanamid, specifically described the cargo as acrylonitrile, and that the Regulations did not classify the chemical as an explosive, or as a Class A, B or C poison. During the course of the negotiations leading up to the issuance of the Bill of Lading, the export manager of Cyanamid furnished to representatives of Andersen the pamphlet entitled, "Handling-Storage-Analysis of Acrylonitrile." The physical properties of the chemical, including its explosive limits, the fact that it was toxic and that it was flammable are set

forth in the pamphlet. This is conceded by Andersen. However, it is argued that the ship, and her owner, had a right to rely on the classifications of the Coast Guard made pursuant to the statutes and regulations, and that a stowage of cargo in accordance with such regulations, insulates the vessel and her owner against a charge of unseaworthiness or negligence in connection with such stowage. Although the language used in *Marshall v. Isthmian Lines, Inc., supra*, p. 134, 135[15] speaking of the Regulations, was employed in connection with a factually distinguishable background, we think the rule there stated is sound, and should be applied to this charge against BEREAN and Andersen. Another statement of the same legal principle is that official duty has been legally performed. The law so presumes. *Board of Public Instr. v. Osburn*, 101 F.2d 919 (5th Cir. 1939); *Continental Bank & Trust Co. v. Brandon*, 297 F.2d 928 (5th Cir. 1962); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

We do not believe that BEREAN and Andersen were required to inquire into the validity of the classification of the chemical made by the Coast Guard experts. As applied to the ship and her owner, there was nothing in the Cyanamid pamphlet which would require a different result.

Again, on this point, we are faced with a line of authorities that are distinguishable. Take for instance the *Petition of Oskar Tiedemann and Co.*, 289 F.2d 237 (3d Cir. 1961). The question before the judge was whether the owners of a tanker could claim limitation of liability after they al-

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15 334 F.2d 134, 135.

"The whole statutory scheme is something much more than a set of prohibitions with punitive sanctions. It establishes a standard of care to which all concerned are bound, including those who do, and those who do not, wish to comply."

lowed her to sail with tanks that had been emptied of a cargo of petroleum, but contained flammable fumes. The court found that the fumes were more dangerous than liquid cargo and that the vessel did not have proper gas-freeing apparatus and was, therefore, unseaworthy. Again, this is a case where the findings of the judge were upheld. In *C. J. Dick Towing Co. v. THE LEO*, 98 F. Supp. 455 (S.D. Tex. 1951), *aff'd.* 202 F.2d 850 (5th Cir. 1953), gasoline or some other explosive liquid had been allowed to leak into the end section of a barge. This section was not intended for cargo. The judge held that those in charge of the vessel were negligent in not properly inspecting the tow and in allowing the rake tank to be in such a condition that it was a menace and a hazard. Of course, there is no such finding before us. That the existence of gasoline or other explosive fumes, in an area of a ship not designed for that purpose, creates an unseaworthy condition, we have no doubt. No such problem confronts us. The negligent stowage of flammable cargo in a maner which violated approved methods of stowing naphthalene as delineated in the safety regulations of the Coast Guard and of the Dutch Government, was presented by the facts in the *Petition of SKIB A/S JOLUND*, 250 F.2d 777 (2d Cir. 1957), reaffirmed on second appeal 269 F.2d 68, *cert. denied* 356 U.S. 933 (1958). That case offers an interesting dissertation on that type of liability, but is here of no significance. The same can be said of *In Re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) and *Dalehite, et al, v. United States*, 346 U.S. 15 (1953). Such decisions do not remotely support appellants' contention that a tanker may not store flammable cargo in her bow tanks. Again, we have an issue which the judge resolved against appellants. The evidence supports his finding.

ASSIGNMENT VI

Appellants Mitsubishi and Consul General part company with China Union, on the latter's contention that the judge erred in denying it a limitation of liability under 46 U.S.C. § 183 (a).

Our analysis of the record convinces us that the judge was correct in denying China Union limitation and in holding that its own negligence with privity and knowledge contributed to the unseaworthiness of the RELIANCE and the collision as follows:

(a) her steering gear was unseaworthy;

(b) her main engines were unseaworthy;

(c) her captain and chief engineer were not instructed to the effect that all four of her main engines might be coupled astern; and

(d) her telephone communication system between the bridge, engine room and steering engine room was unseaworthy.

We have already dealt, at length, with the judge's findings on the fault of the RELIANCE. Those findings are buttressed by an adequate record. To here repeat those findings would be repetitive in the extreme.

Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation. The judge in holding that there was privity and knowledge on the part of China Union and in denying limitation was well within

the standards applied in *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963).

Instead of showing that the unseaworthiness of the steering gear of the RELIANCE was without the privity and knowledge of China Union, its witnesses provided damaging testimony clearly showing the contrary. First of all, the Greek Nationals, by whom the vessel was sold to China Union, would not permit a thorough inspection of the vessel by its representative. On the limited inspection he made, he found many conditions in the engine room which were sub-standard. On his survey of the RELIANCE, he found the door of the steering engine room locked. On arrival of the vessel in New Orleans, the first chief engineer recommended to the company that all auxiliary engineering equipment be opened, inspected and overhauled. Nothing was done on this recommendation. China Union, evidently in an effort to save expenses, did not make such inspections, breakdown or overhaul. The testimony is quite clear that China Union would not permit a thorough inspection of the steering gear while the ship was in Taiwan. Many spare parts, which would be normally carried on a vessel of this type, were missing and, in particular, essential parts in connection with the steering apparatus were missing. This, and other evidence, fully supports the judge's finding[16] of privity and knowledge of a defective

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16 "The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost constant difficulties

steering gear on the part of the owner. Likewise, the judge's findings that the vessel was unseaworthy in the other respects with the privity and knowledge of China Union are as fully supported by the evidence. *THE CITY OF CAMDEN*, 292 F. 93 (3rd Cir. 1923), cited by China Union, lends neither substance nor support to its contention. On the other hand, the principles stated in that case are in full accord with the findings here under attack. The burden of proof as to the absence of privity or knowledge was on China Union. *Coryell v. Phipps*, 317 U.S. 406, 409; *States S.S. Co. v. United States*, 259 F.2d 458 (9th Cir. 1958), *cert. denied* 358 U.S. 933 (1959), *rehearing denied* 359 U.S. 921 (1959); The Law of Admiralty, Gilmore & Black, 705.[17]

We do not question the soundness of the authorities cited by China Union on this assignment. Yet, the attempt by it to apply the doctrines stated in those cases to our factual background is entirely unsuccessful. Her claim that the RELIANCE'S sheer across the channel was caused by her navigating too close to her starboard bank is foreclosed by the judge's finding that the sheer was caused by unseaworthy steering gear. The district court's findings that the RELIANCE'S main engines were unseaworthy and that her captain and chief engineer were not properly instructed prevent a successful assault along those lines. China Union states that there is no evidence whatsoever to support the

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encountered with the main engine, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction." (F. 31, R. 5133-5134.)

[17] "It seems reasonable that the shipowner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge."

judge's finding that the RELIANCE'S telephone communication system between the bridge, the engine room and the steering room was unseaworthy. This statement is clearly wrong. The record contains uncontradicted evidence that when the emergency arose on the RELIANCE, and communications had to be made between the bridge and the engine room, and between the bridge and the steering engine room, this was accomplished by sending messengers running about the ship, rather than by attempting to use the sound powered phones. Certainly, this creates a strong presumption that the phones were out of order. This evidence and the inferences to be drawn therefrom, clearly support the judge's finding that this condition contributed to the collision and that there was no direct means of phone communication between these important stations on the vessel. Obviously, a prompt telephone call to the steering engine room for full speed astern, might well have averted the collision.

There is no substance to this assignment.

ASSIGNMENT VII

On this assignment, appellant China Union disclaims liability on the theory that the fire originated from the other vessel and that it, as a carrier, was protected under its Bill of Lading and the Fire Statute.

The provisions of CGSA[18] required China Union to exercise diligence: (a) to make the ship seaworthy; (b) to properly man, equip and supply the ship. Subsection (8) of the Act nullifies any clause, covenant or agreement in a contract of carriage which would relieve the carrier or the ship from liability for loss or damage, to or in connection

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18 46 U.S.C. §§ 1300, et seq.

with the goods, arising from fault or failure in duty in the obligations imposed by the Act. 46 U.S.C. § 1303 (8). Section 1304 (1) places on the carrier the burden of proving due diligence when the loss or damage results from unseaworthiness. These provisions and the finding by the judge of unseaworthiness on the part of the RELIANCE, places the petitioner beyond the protective provisions of the Act. The particular fire was "caused by the actual fault with privity of the carrier." CGSA offers no escape to China Union. Even if the issues were doubtful they would be resolved in favor of the cargo. *THE SOUTHWARK*, 191 U.S. 1 (1903); *Artemus Maritime Co., Inc. v. Southwestern Sugar & Molasses Co., Inc.*, 189 F.2d 488 (4th Cir. 1951).

CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks, next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical

and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings, the judge made it clear that he was passing on the issue

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19. "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

20. "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R.3454.)

of the liability.[21] We must view this record as the findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred."

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21 ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against the respondent." (Emphasis supplied.) (R. 5118.)

The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evidence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard"; five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal

injuries were caused by fire.[22] While this specific finding was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens*, 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant*, 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of

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[22] "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

these men died from exposure to acrylonitrile.[23] With the opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogen cyanide"

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[23] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done—such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide.**" (Emphasis supplied.) (R.2129.)

was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles

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[24] (1) 46 C.F.R. § 146.21-100, p. 172, §146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injuncton, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines,* 306 F.2d 135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam,* against China Union, *United States v. Bethlehem Steel Corp.,* 319 F.2d 512 (9th Cir. 1963), *cert. denied* 375 U.S. 966 (1964) and *United States v. Zubik,* 295 F.2d 53 (3rd Cir. 1961), we must remember that

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25 Sold as scrap for $109,100.00.

it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil*

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

Co., et al, 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner,* 57 F.2d 466 (8th Cir. 1932). Even in the absence of a finding of fact, this being a trial *de novo,* we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and thereafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental to the removal and enforcement process, such as the expense of safe-guarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold.

Those making the decision were of the opinion that (1) two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's

office, caused shipkeepers to be placed aboard and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment: *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 950 (2d Cir. 1949).

OTHER CLAIMS

China Union claims a right to payment of its own salvage expenses out of the limitation fund, on the theory that the value to be surrendered in a limitation proceeding is the value of the owner's interest in the vessel immediately after the casualty. Here, we call attention to the fact that the judge reserved ruling on this particular issue and at one time indicated that he favored the position of China

Union.[28] One of the provisions of the interloctuory decree makes it crystal clear that the judge was not passing on the issues between claimants to the limitation fund.[29] The validity of petitioner's salvage claims, including its claim for the refund of said $8,582.00, and other sums previously paid into the registry, are subject to the "further orders" of the District Court.[30]

The assessment of interest against China Union on the originally unlisted prepaid freights, was a matter within the sound discretion of the judge. Petitioner's claim that it proceeded in the utmost good faith, in withholding such freights, was a subject to be weighed and considered by the judge in charge of the proceeding. Obviously, he felt that the petitioner's action, in consistenly attempting to set off its claimed salvage charges against the amount of the prepaid freight and interest, was arbitrary and unnecessary. The record supports this assessment of interest. An allowance of interest is recognized in *LA BOURGOGNE*, 139 Fed. 433 (2d Cir. 1905); *LA BOURGOGNE (Deslions v. LaCompagnie Generale Transatlantique)*, 210 U.S. 95 (1908). Even if viewed as a penalty, the exaction of the interest under the facts in this case would be justified.

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28 Order, January 28, 1963.

29 "(3) That after payment of the Trustee's expenses, as hereinabove provided, the claim of the United States of America shall be paid as hereinafter provided, **following which any funds remaining in the registry of the Court shall remain pending further orders of this Court.**" (R. 5148.) (Emphasis supplied.)

30 China Union, whose fault was the sole cause of the casualty, may not be entitled to make a claim for salvage, THE CLARITA and THE CLARA, 90 U.S. 1, 18 (1874).

CONCLUSION

On appeal in an admiralty case, the appellate court is bound by the findings of the trial court and they will not be set aside unless the party seeking to have them overturned demonstrates that they are not supported by credible evidence, or were induced by an erroneous view of the law. *Trinidad Corp. v. Indian Towing Co.*, 293 F.2d 107 (5th Cir. 1961), *cert. denied* 369 U.S. 861; *Ohio Barge Line, Inc. v. Oil Transport Co.*, 280 F.2d 448 (5th Cir. 1960).

On the entire record, to considerable of which we have made specific reference, we hold that the trial judge's findings were amply supported by substantial evidence, and not clearly erroneous. We have a firm conviction that each of the parties received a fair and an impartial trial. We find nothing in the brief of Lucy Duncan to justify striking the same from the file. The motion is denied. The interlocutory decree is affirmed.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RELIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were caused or ag-

gravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V.," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crew members, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absolute which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly claims a pre-

eminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain death.[33] And that is what Cyanamid's own pamphlet re-

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31 Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

32 In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

33 Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

flected in vivid terms.[34]

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[34] As to handling the chemical, Cyanamid explains:

> "The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

> "Protective equipment should be made available to those entering [storage] tanks. This equipment should include cover-alls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

> "Use this type of canister (organic vapor) **only** in locations where Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

> "Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.
>
> "* * *
>
> "Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms. * * *."

And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

> "Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which

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will depend on local conditions and use of streams." And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.) Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A poison, § 146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." § 146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts §388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, ... AMC . . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast

Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these extremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophes, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Unions' standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would re-

[35] BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each, port and starboard, side.

quire of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have decided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v. Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, ... AMC . . . . If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by § 146.25-10(1)(2) (see note 34, supra) would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. § 39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA § 170(10).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Caption Omitted)

(October 7, 1966)

ON PETITIONS FOR REHEARING

Before BROWN and GEWIN, Circuit Judges, and KILKENNY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above styled and numbered cause be, and the same are hereby, denied.

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* Of the District of Oregon, sitting by designation.

APPENDIX C

DECISION OF DISTRICT COURT

(Caption Omitted)

(Filed July 17, 1963)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

At approixamtely 11:15 p.m. on the night of November 7, 1961, the Chinese Motor Vessel UNION RELIANCE and the Norwegian Motor Tanker BEREAN were in collision in that portion of the Houston Ship Channel which crosses Galveston Bay. As a result, twelve lives were lost and certain personal injuries were sustained aboard the UNION RELIANCE. Both vessels were damaged and damage was done to the cargo aboard each vessel.

Both vessels caught fire, though the fire aboard the BEREAN was extinguished within a matter of a few hours. The UNION RELIANCE remained ablaze and at anchor, blocking the Houston Ship Channel at a point close to Buoy No. 73. On November 10, 1961, while still ablaze to such extent that no one could board her, the UNION RELIANCE was towed by the United States Corps of Engineers to Galveston Harbor, where she was anchored.

THE LITIGATION

Shortly thereafter, the United States of America filed her libel *in rem* against the UNION RELIANCE seeking the immediate sale of the vessel and the recovery of the expenses incurred by the United States in removing her from the Houston Ship Channel and for safeguarding her while at anchorage. Shortly thereafter, China Union Lines,

Ltd., owner of the UNION RELIANCE, filed its petition for exoneration or limitation of liability; and on November 29, 1961, obtained the customary order from this Court prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding.

In connection with its petition to limit, China Union Lines elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. Ben G. Sewell, Esq. was appointed Trustee and entered upon his duties. Upon the recommendation of proctor for petitioner, and a need therefor appearing, the Court appointed J. R. Bencal, a competent and experienced marine surveyor, (and who had been employed in that capacity to represent petitioner's interest from the inception) as salvage master, and authorized such salvage master to undertake the steps necessary to extinguish the fire in the vessel's holds and to bring her into port for the purpose of discharging her remaining cargo preparatory to sale.

Meanwhile, in other procedings in this Court, China Union Lines had filed its libel against the BEREAN. Her owner, A. O. Andersen & Co., Inc., appeared, claimed the vessel, answered and cross-libeled against China Union Lines. The owners and underwriters of the lost and damaged cargo aboard UNION RELIANCE filed their libel against BEREAN and her owners. Similarly, American Cyanamid Company, the owner of the only cargo lost aboard BEREAN, filed its libel against UNION RELIANCE.

The officers and members of the crew of UNION RELIANCE who were killed or injured all were Nationals of the Republic of China. The Consul of that government, residing in Houston, sought to recover for these injuries and deaths, against both vessels. Also killed as a result of

the collision was the Houston Ship Channel Pilot (Captain Duncan) aboard UNION RELIANCE, whose widow, Lucy Duncan, has made claim against UNION RELIANCE and her owners.

Thereafter came several claims by owners of ships which allegedly were delayed by the blocking of the Houston Ship Channel for a period of some two days.

Additionally, China Union Lines, and the owners and underwriters of the cargo aboard UNION RELIANCE and various other parties filed separate libels directly against American Cyanamid, as owner of the cargo of BEREAN. It was the theory of these libels that the acrylonitrile carried by BEREAN, and which had spread, caught fire, and ignited the two vessels, was of such dangerous nature and propensity as to render the owner-shipper liable to the injured parties.

PRE-TRIAL DEVELOPMENTS

Pursuant to the order of the Court appointing him salvage master, J. R. Bencal, working in close connection with proctor for petitioner, secured equipment and services with which he was able to extinguish the fire aboard UNION RELIANCE. Thereafter she was brought into the port of Galveston, her cargo was discharged, and she was made ready for sale. Under order of Court, the remains of the vessel were sold by the Trustee for a gross price of approximately $109,000.00.

Thereafter application was made to the Court and to the Trustee for the immediate payment from these proceeds of sale for services and materials furnished at the request of the salvage master. Petitioner sought to be reim-

bursed for sums expended in this fashion. The United States sought to recover its expenses in moving and safeguarding the vessel, as salvage claims. The firemen, and those furnishing the equipment used in combating the fire, made similar claims. After one or more hearings with respect thereto, this Court entered an order on March 12, 1962, by which provision was made for their disposition. That order was made the subject of an interlocutory appeal which originally was allowed by the Court of Appeals for the Fifth Circuit. After hearing, however, the order allowing the appeal was vacated and the cause remanded to this Court for further proceedings (306 F.2d 135). Thereafter, extensive hearings again were held by this Court resulting in the order of January 28, 1963, directing the immediate payment of certain salvage claims, and deferring the payment of the remainder of such claims pending a decision on the issue of liability.

This maze of litigation was consolidated, and the pleadings amended so as properly to tender to the Court all issues of liability.

THE TRIAL

Trial on the issue of liability alone commenced March 11, 1963, and proceeded until April 12, 1963. The Court heard witnesses from among the officers and crews of each vessel, and others, and received voluminous documentory evidence. At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence

produced by petitioner. The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against that respondent.

FINDINGS OF FACT

The Vessels and Their Owners

1. The petitioner in limitation, China Union Lines, Ltd., is a private corporation organized and doing business under the laws of the Republic of China, having its principal office in Taipei, Taiwan.

2. The UNION RELIANCE was a steel motor ship, 496 feet in length, designed for the carriage of dry cargo, built in the United States in 1940. Having served several owners under several flags, she was purchased from Greek nationals by China Union Lines, Ltd., in April, 1961.

3. UNION RELIANCE was one of only four vessels constructed in the same yard and at about the same time, with main engines of this type. She was fitted with four diesels, controlled in pairs, and equipped with electromagnetic couplings, through which the power of either or both pairs, operating either ahead or astern, could be transmitted to the propeller shaft. These engines were designed to give 240 engine revolutions per minute, and, with a 3-1 gear ratio, to give 80 revolutions of the shaft per minute. As will be noted more in detail hereafter, however, by reason of age, wear and poor maintenance, at all times material to this proceeding, the engines were not capable of approaching this efficiency.

To change the direction in which power is imparted to the propeller shaft (that is, if the propeller is driving the vessel forward, and if it is desired to impart astern power), it was necessary to stop the engines by cutting off the fuel supply, to change the cam setting, and to restart the engines.

With all four engines operating at or near design efficiency, one pair of engines normally produced sufficient power, and revolutions of the shaft, for routine harbor maneuvering. Hence the design permitted—and contemplated—one pair of engines to be kept running ahead, and the other pair kept running astern at all times while the vessel was in pilot waters. Thus the engineer could reverse the direction of the screw by a simple maneuver of uncoupling one set of engines, and coupling on the others. When desirable, all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was not a difficult or time consuming operation, and could be accomplished by competent engine room personnel in a matter of approximately one minute.

4. The UNION RELIANCE was equipped with a hydraulic steering system, located in the steering engine room (to be distinguished from the engine room, where the main engines were installed). Hydraulic rams served to move the rudder in the desired direction. Hydraulic fluid (or telemotor oil) under great pressure actuated the rams.

Two separate and distinct steering systems were available to force the hydraulic fluid, under pressure, through the system and against the rams. These were used alternatively; while one was in use, the other served as standby.

The principal component of each such steering system was a large pump. The pump was powered by a 50 horsepower electric motor. There were a number of auxiliary pumps and motors, of particular relevance here being a small so-called "replenishing pump."

In normal operation, hydraulic fluid escaped from the system and was collected in a sump tank. It was then lifted by means of this replenishing pump to an overhead replenishing tank, from which point it was fed back into the system for further use through gravity. The replenishing pump was powered by a one horsepower electric motor.

Some 35 gallons of hydraulic fluid were required to fill each system. While some minor leakage was expected, in normal operation it should have been necessary to add only small quantities of fluid at infrequent intervals.

5. The BEREAN was built in Norway and delivered to her owner and operator, A/S A. O. Anderson & Co., a Norwegian corporation, in April, 1961. She is 508 feet long. 65 feet in beam, powered by one 9000 horsepower diesel engine. She has no midships house; her navigating bridge is in the forward part of the after house, some 350 feet from the bow.

6. The cargo space of the BEREAN is divided into 42 tanks. She is designed and equipped to carry many varieties of bulk liquids. Some tanks are stainless steel lined; others are equipped with heating coils for handling viscous liquids, etc. She had been engaged in the chemical trade during the several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The shell of the ship constitutes the outer wall of certain of her wing tanks. There were no

protective cofferdams or protective voids surrounding such tanks. Under pertinent Coast Guard regulations, those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics", under 46 C.F.R., Part 39.

The Cargoes and Movements Preceding the Casualty

7. Following her purchase from Greek interests, UNION RELIANCE sailed from Piraeus, Greece, through the Mediterranean and to the United States, calling at Tampa, Florida, and New Orleans, Louisiana. By this time her Captain and crew had discovered that extensive repairs were needed in the engine room, the most immediate need being for an overhaul of the engine control mechanism. A marine surveyor and engine expert one Spindanger, together with an officer of petitioner, flew from New York to New Orleans to supervise these repairs. While these repairs to the engine controls were underway, each of the four main engines was opened, and the cylinder heads were found badly worn and eroded. Replacements were not readily available and the old cylinder heads were re-installed. Spindanger made a full report to the owners of the work which he had accomplished, and of other work which he recommended, to place the engine room in proper condition. While the New York office of petitioner was aware of the contents of this report promptly, it was not received in Taiwan until after the collision.

On departing New Orleans, UNION RELIANCE proceeded to Houston, thence through the Panama Canal, up the Pacific Coast, and thence to Japan and Taiwan. Additional engine repairs were accomplished in Taiwan.

Her Captain, chief engineer and others of her complement were replaced, and the officers and crew who were aboard at the time of the casualty took over the vessel in Taiwan. She loaded a general cargo there and in Japan for carriage to the United States. She discharged a part of this cargo at Los Angeles and received aboard at that port five of the large number of piston heads which were needed for her main engines. However, these were never installed prior to the collision. From Los Angeles, she proceeded through the Panama Canal en route to Gulf Ports.

8. The UNION RELIANCE arrived in Houston November 5, 1961, discharged a portion of her cargo and left the Houston dock at 6:30 p.m. November 7. She proceeded seaward, unassisted by tugs, and with Houston Ship Channel Pilot Duncan on her bridge. She was drawing approximately 16 feet 8 inches forward and 23 feet 5 inches aft.

9. At approximately 8:30 p.m., while UNION RELIANCE was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system which was in use at the time. The engines were stopped, the anchors dropped, and the vessel brought to rest. The starboard steering system was disconnected, and the port system connected. It was tested by turning the wheel a number of times, and the rudder indicator showed that the rudder responded, and that the port system was operating properly. The anchors were lifted and the vessel again got underway. This was at about 9:00 p.m.

Repairs were promptly undertaken on the starboard steering system. It was found that a brush holder on the 50 horsepower electric motor which operated the starboard steering pump was defective. The chief electrician under-

took to repair the damaged part and had done so, but had not replaced the part in the engine. Hence the starboard steering system was not in operating condition from that moment forward.

The UNION RELIANCE proceeded outward from this point with the port steering system apparently functioning properly until shortly before the collision.

10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naptha, etc. It is not classified as an "extremely dangerous poison", nor as a "less dangerous poison" (46 C.F.R. 146.25-5; 146.25-10).

12. The BEREAN arrived at the Galveston Bay at approximately 9:15 p.m. on November 7, 1961. In addition to the acrylonitrile mentioned above, BEREAN carried a mixed cargo of bulk liquids. She was drawing 19 feet forward and 25 feet aft. Houston Ship Channel Pilot Lary

boarded the BEREAN in the vicinity of the sea buoy and assumed active control of her navigation as she was proceeding inbound toward Houston.

13. From the sea buoy to the point of the collision and beyond, the Houston Ship Channel passes through the open and unobstructed waters of Galveston Bay. The channel has a dredged width of 400 feet and depth of 36 feet. Crossing Galveston Bay, the channel is relatively straight. When weather conditions are favorable, it is the custom and practice of most vessels to navigate this portion of the channel at "full ahead", except when passing other ships.

From Morgan's Point inward to Houston (being that portion of the channel which the UNION RELIANCE had navigated prior to the collision), the channel is more tortuous; there are many shoreside installations. Thus a vessel is required to maneuver to a far greater extent than in that portion of the channel outward from Morgan's point.

14. During the course of her passage from the sea buoy to the point of collision, Pilot Lary, her second mate (Haugen) and a helmsman were on the BEREAN's bridge at all times. Her captain (Larsen) was on the bridge a majority of the time, although he had repaired to his cabin shortly before the emergency presented itself, and returned to the bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour, and it was his duty then to proceed to the bow of the ship to serve as lookout for an hour, before returning to duty at the wheel. However, the practice was followed on the BEREAN, when weather and visibility were favorable and the vessel was pro-

ceeding routinely, to permit the helmsman a 10-15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose.

Both bow anchors of the BEREAN were ready to be let go, but BEREAN had no one standing by the windlass to serve as anchor watch. By reason of the nature of the channel in that area, as set out above, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point.

15. The collision occurred in the Houston Ship Channel at a point between Five Mile Point and Red Fish Reef. At Five Mile Point (Beacons 75 and 76), the Ship Channel requires a turn of about 15 degrees to port from an outbound vessel, as was the UNION RELIANCE. From the point of this bend, to the scene of the collision and beyond, the channel is straight. Buoy 73 is located on the west side of the channel approximately seven-tenths of a mile below Beacon 75. Beacons 71 and 72 are located opposite one another, at a point approximately seven-tenths of a mile below Beacon 73.

16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour.

17. UNION RELIANCE was navigating at a speed of 9-10 knots over the ground when she made the bend at Five Mile Point. Each vessel saw the lights of the other at about this time. BEREAN blew a one blast signal, which was not answered by UNION RELIANCE.

18. In negotiating this turn, UNION RELIANCE navigated somewhat to her starboard side of the channel, and away from the center line of the channel. This was noted and commented upon by the pilot of the BEREAN. This maneuver was of little consequence, however, and did not cause the vessel to sheer away from the starboard bank, did not cause loss of control of her steering, and did not precipitate the casualty (as is contended by petitioner).

19. In negotiating the turn in the channel to her port, the UNION RELIANCE pilot ordered her rudder 5 degrees to port. This was at approximately 11:10 p.m. The rudder responded to this movement of the wheel, and the vessel started her turn to port. However, at this point the steering gear of the UNION RELIANCE failed with the rudder in the 5 degree port position, and she continued to swing under that rudder setting. The quartermaster was unable to move the wheel in either direction. She never straightened her course thereafter.

20. When it became evident to the Captain, the pilot, and quartermaster that the wheel would not respond, by engine order telegraph the bridge notified the engine room to reduce speed, and shortly thereafter to stop. The third mate, who was on watch, was ordered by the Captain to search out the chief engineer and advise him of the rudder failure. The engine room was ordered to give full speed astern to the engines.

21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE.

22. Efforts to transfer the steering control on the bridge of the UNION RELIANCE from the telemotor system (which had been in use) to the gyro-pilot was unsuccessful, and UNION RELIANCE continued to swing to her port out of control. Prior to the emergency, UNION RELIANCE's four engines had all been coupled in the ahead position for maximum forward speed. On receiving the order for full power astern, the engine room undertook to, and did, reverse one set of two engines, and coupled same to the propeller shaft to give astern power. Nevertheless, the vessel continued in her swing to port with some headway. The remaining two engines were never reversed and coupled to the shaft, for reasons which will be noted hereafter.

UNION RELIANCE continued to have headway until she collided with the port side of the bow of the BEREAN at 11:13-1/2 p.m.

23. The pilot of the BEREAN observed the UNION RELIANCE as she was in the turn of the channel mentioned above, and about 3 miles away. Prior thereto, BEREAN had been navigating at "full ahead" and was making 13 to 14 knots. On observing UNION RELIANCE coming out of the bend, at approximately Beacon 75 and 76, BEREAN's speed was reduced to "half ahead" and shortly thereafter to "slow ahead". It was at this time that the one blast signal was given by BEREAN. While it was not answered, the BEREAN pilot expected to make a normal port to port passing.

The pilot of the BEREAN noted, and comented to the watch officer, that UNION RELIANCE was somewhat closer to her starboard bank of the channel than was necessary or customary in making the bend. They watched her

swing to her port, and became somewhat apprehensive. BEREAN turned slightly to her starboard, expecting to negotiate the port to port passing. However, a three blast signal from UNION RELIANCE was heard, and the sound of the anchor letting go was heard at approximately the same time, and the pilot of the BEREAN imediately recognized that an emergency presented itself. He blew three blasts in return, and immediately ordered full speed astern on the BEREAN's engines and gave her hard right rudder, intending to put her aground in the mud bank at the side of the channel. These orders were complied with. At this time, the vessels were approximately one-fourth mile apart, and were closing on each other.

24. At this time, and since 11:00 p.m., the BEREAN had been without her regular bow lookout. This resulted from the fact that at 11:00 the lookout had returned to the bridge to relieve the seaman at the wheel. The helmsman, before going forward to assume the bow lookout, was directed to fetch coffee for those on the bridge and was engaged in doing so during this interval.

25. The BEREAN had no one standing by to drop her anchors. When the BEREAN pilot recognized the emergency condition of the UNION RELIANCE (when he ordered the engines full astern, the hard right rudder), he likewise ordered the starboard anchor dropped. The watch officer who was on the bridge with the pilot immediately went forward for the purpose of letting go the anchor. However, before he reached the bow, the watch officer felt BEREAN go aground in the mud, and observed UNION RELIANCE bearing down upon the port bow of his vessel in such fashion that he recognized that a collision was in-

evitable. HENCE he did not continue forward, and did not let go the BEREAN anchor, but returned to the bridge.

26. BEREAN ran aground into the mud on her starboard side of the channel immediately before or about the time of the impact. She had little, if any, headway, though the violent wheel maneuver and her efforts to stop caused her stern to swing somewhat to port and across the channel. The bow of the UNION RELIANCE struck BEREAN on her port side somewhat behind her stem. The UNION RELIANCE had lost most of her speed at this time. The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

27. As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew.

Fault and Negligence

28. The primary and direct cause of the collision was the failure of UNION RELIANCE to keep to her starboard

side of the channel. This resulted from a failure of her port steering system (her starboard steering system having previously failed) and constituted a violation of the provisions of 33 U.S.C.A., Sections 203 and 210. This constituted fault and negligence on the part of UNION RELIANCE. [1]

29. By reason of the extensive damage to the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired. However, the steering engine room was not damaged. From the evidence which I consider most credible, and the most likely circumstances, it appears, and I find, that the failure of the port steering system resulted from a loss of hydraulic fluid; and the loss of hydraulic fluid, in turn, was caused by the failure of the one horsepower electric motor which powered the replenishing pump for the port steering system.[2]

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[1] There was much testimony on the trial from both sides attempting to explain the movement of UNION RELIANCE to her port and across the channel. Petitioner's theory was that she had approached too close to her starboard side of the channel and, by reason of suction caused thereby, she had sheered to her port; was never able to right herself; and continued the sheer completely across the channel. This is supported by a little more than (1) evidence that she did in fact approach closer to her starboard bank than was customary, (2) a suggestion from the pilot of the BEREAN that this might have caused her to behave in this manner. There is no substantial evidence that this in fact did cause this movement; while there is uncontradicted evidence from all of the officers and members of the crew of UNION RELIANCE who were in position to know, that her steering system failed.

[2] In normal operation, telemotor oil leaks from the main pump into a sump tank. The oil is lifted from the sump tank to an overhead tank, from which it again goes into the system by gravity flow. Thus, if the replenishing pump is not operative (or if the electric motor which powers it is not operative) in a matter of a few hours the oil in the system is exhausted, the system be-

30. The failure of the small motor powering the port replenishing pump was due to the fact that a fuse was burned out in the electrical lines serving that motor. This occurred in all probability when the port steering system was put in operation following the original steering failure at about 9:00 p.m. This resulted from the fact that the chief electrician made use of a certain wooden block to circumvent the safety and protective feature of an electric solenoid in the electrical system serving this motor.[3]

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comes filled with air, and the rams do not cause the rudder to respond.

This explanation is strongly supported by the uncontradicted testimony that on the occasion of the joint survey the port system was practically devoid of hydraulic fluid, and when power was applied, moved erratically, if at all; but that after some 30 to 35 gallons of telemotor oil was added, it operated properly. I am convinced that this loss of fluid resulted prior to the collision and was the cause of the steering failure. I am unable to accept the explanation offered by petitioner that the oil leaked out after the collision and before the survey.

[3] As in the preceding finding, the evidence does not conclusively show the cause of this failure. I credit, however, the following testimony.

Shortly before or in the course of the joint survey, a fuse was found to be burned out in the electric circuit which controlled the one horsepower motor serving the port replenishing pump. There is no direct evidence as to when the fuse was blown. However, from the time the vessel was received from its Greek owners, the chief electrician had made use of a wooden block to prop and secure in place an electric solenoid in the electric circuit serving this motor (another block was used in a similar fashion in another line). This solenoid was designed to protect the motor from the full surge of electrical current when the motor is switched on, and to permit the current to be applied gradually. If an unduly heavy surge of current passed through the line, the solenoid was designed to drop open, breaking the circuit, and protecting the motor. The wooden block held the solenoid in place and thus rendered the protective feature inoperative. This was

31. The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost con-

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calculated to cause a blown fuse when this motor was engaged. Had this occurred at about 9:00 p.m. and the system not been replenished with hydraulic fluid, the fluid well might have been exhausted, and the system inoperative, by 11:00 p.m.

This testimony as to the blown fuse came from the witness J. R. Bencal and the following circumstances surrounding this testimony should be noted. Mr. Bencal is a recognized and, I believe, highly regarded marine surveyor in the Port of Houston. As stated earlier herein, he was employed almost immediately following the casualty by the petitioner and undertook to represent petitioner's interest throughout. He was in charge of the team of surveyors representing petitioner at the joint survey (which included Spindanger, an expert on the main engines, and Tarabochia, an expert on hydraulic steering systems). As stated heretofore, Bencal was appointed by the Court as salvage master at petitioner's suggestion, and by reason of his services in this regard in extinguishing the fire, his early examination of the vessel and her cargo, he was probably more familiar with the situation which prevailed aboard UNION RELIANCE following the casualty than any other individual. He was not called as a witness by petitioner. When he likewise was not called as a witness by the respondents (who obviously were fearful of being bound by his testimony), the Court summoned Bencal as a witness and advised all parties that they might cross-examine, and not be bound by his testimony. It was he alone who has testified as to the blown fuse of the electric motor mentioned above. As his memory had been refreshed from notes made at the time and the report written to his principals shortly after the joint survey, I find no reason why his testimony on this point should not be accepted.

stant difficulties encountered with the main engines, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction.

32. The UNION RELIANCE was unseaworthy from the inception of the voyage in which she was engaged, by reason of the incompetence and inability of her Captain, chief engineer, and other crewman to operate and maneuver UNION RELIANCE properly, efficiently, safely, or within her full potential. Specifically, I find that neither the Captain nor chief engineer was aware of the fact that all four of her main engines might be coupled astern. There was no agreed signal whereby the bridge could order the engine room to couple all four engines astern. By reason of this lack of knowledge, only half of the potential backing power of UNION RELIANCE was applied in an effort to stop her forward movement before the collision. Additionally, the Captain was unaware that reverse power might be applied in a very short time (probably a matter of one minute) if the engine room crew operated efficiently.[4]

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[4] It is clear from the evidence that neither the Captain nor the chief engineer was aware that the four engines might all be coupled astern, and thought that only two might be so utilized. Spindanger testified that at the time of the repairs at New Orleans on her first voyage, he had explained fully to the engineering officers and crew how to change the engines from ahead to astern; how all four engines might be so utilized; and that the whole operation would take probably one minute. The Captain and chief engineer of that voyage were relieved in Taiwan, and replaced by Captain Shu and chief engineer Hsu Bah. The new chief engineer had never before sailed on a vessel with a similar four-engine arrangement, and had received instructions from his predecessor only during the course of a one day voyage.

On entering the Houston Ship Channel some three days before the accident, the Captain told Houston Ship Channel Pilot Collie

33. UNION RELIANCE was at fault in failing to make use of all four engines in going astern immediately prior to the collision. Had the additional astern power been applied, it is highly likely that the collision would have been avoided.

34. The telephone communication system between the bridge, the engine room, steering engine room, etc. aboard the UNION RELIANCE was inoperative. While the bridge might give signals to the engine room by means of the telegraph, there was no other means of communication except (as was done shortly before the collision) to send a messenger, or to station a man with a megaphone midway between the bridge and steering engine room, to relay messages. This obviously made the transmission of messages more difficult and slow, and decreased the efficiency of the vessel.

35. The fault and unseaworthy condition referred to in the preceding paragraphs were the result of petitioner's failure to exercise due diligence to make the UNION RELIANCE seaworthy, and the failure to equip her with a competent and experienced crew. The collision and losses resulting therefrom were occasioned with the privity and knowledge of petitioner.

36. The BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 p.m. until the time of the collision. On most careful consideration, I find that

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that if all four engines were hooked up ahead (as was done to get maximum speed and power in crossing the Galveston Bay portion of the channel), it would require 10 to 15 minutes before any astern power could be applied. Shortly before the collision, the Captain told Houston Ship Channel Pilot Duncan that about 10 minutes would be required to give astern power when the four engines were coupled ahead.

this failure did not, and could not have caused or contributed to the collision. This is so because Pilot Lary saw the UNION RELIANCE several miles away; observed her lights constantly thereafter; and by reason of his knowledge of and familiarity with the channel, he recognized that she was in difficulty at the earliest moment which circumstances permitted. He heard the only whistle signals given by UNION RELIANCE, and took immediate action. A lookout could have done nothing more.

37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger.

38. BEREAN was not negligent or at fault in traveling at the speed which she was making prior to the time that she observed UNION RELIANCE and slowed her speed for the anticipated passing.

39. BEREAN was not at fault in failing to have an anchor watch prior to and at the time of the collision. It is not the custom of ships to maintain an anchor watch in this portion of the channel, particularly when the vessel has sufficient power to maneuver readily. Additionally, I find that had the anchor of BEREAN been dropped when her pilot ordered, it would have had little, if any, effect in slowing the vessel under the circumstances which then prevailed, and would not have averted the collision. BEREAN took the quickest and most certain method of losing her headway by running aground.

40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward wing tanks. She violated no Coast

Guard regulation by doing so, and I find this was not a negligent or careless manner of loading.[5]

41. BEREAN was not at fault in failing to go to port to undertake a starboard to starboard passing. She had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed within which such passing might have been accomplished safely, if at all.

42. The Captain and chief engineer of UNION RELIANCE were negligent by reason of their failure to familiarize themselves with their vessel and her engines and their failure to make proper use thereof prior to the collision. This negligence constituted a proximate cause of the collision. Any recovery in favor of the Captain and chief engineer will be reduced by fifteen per cent (15%).

43. The chief electrician of UNION RELIANCE was guilty of negligence in failing properly to inspect and maintain the electrical equipment and circuits in the steering engine room of his vessel. This constituted a proximate cause of the collision. Any recovery in favor of the chief electrician should be reduced by twenty-five per cent (25%).

44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and subsequent thereto, by the United States were, in the light of circum-

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[5] While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship.

stances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity.

45. Certain speed and performance tests were made of the BEREAN shortly prior to the trial. The purpose was to show how she would react under conditions similar to those which existed at the time of the collision. The tests were made in the area in which the collision occurred. Evidence of these tests was received subject to objection. On careful consideration, I am of the view that these tests were not made with a sufficiently high degree of accuracy, and were not sufficiently consistent within themselves, to be of any probative value. Hence this evidence has not been considered.

46. From the foregoing findings, it is apparent that in general the Court has adopted the theory and the contentions of BEREAN, and rejected those of UNION RELIANCE. It is felt that the foregoing findings are supported by a clear preponderance of the evidence. It should be noted, however, that on many of the issues the evidence is in sharp and irreconcilable conflict. In weighing the evidence, notice was taken of the fact that several of the principal witnesses of petitioner were impeached regarding matters of great importance. Note is made of the following examples:

(a) Some 48 hours following the collision, as the senior surviving and uninjured officer of UNION RELIANCE, the third mate was directed to prepare a report of the casualty for his company. He did so in longhand. While the Captain was hospitalized with

severe burns, this report was read to him and received his tacit, if not express, approval and in due course was forwarded to the company. In early pre-trial procedures when extensive exchange of documentary evidence between the parties was had, this report was withheld by petitioner. It was only after trial had begun, and after strenuous efforts by proctor for petitioner, that this document was secured from Taiwan. I am of the view that it was deliberately withheld. This report was inconsistent with the theory advanced by UNION RELIANCE in a number of important respects.

(b) At the original Coast Guard hearing, a few days following the casualty, the chief engineer of UNION RELIANCE testified that his vessel had been using only two engines in running ahead, with two engines standing by to use for astern power. Thereafter the engine room bell book was recovered which showed to the contrary. He changed his testimony thereafter.

(c) The explanation of the chief electrician of UNION RELIANCE regarding his use of the wooden blocks in the starter boxes was entirely unsatisfactory. This is particularly so as he testified that the block in question controlled the replenishing pump motor on the *starboard steering engine* (which, of course, was not in use immediately prior to the collision). Testimony of all of the surveyors showed conclusively that it controlled the replenishing pump motor on the *port* steering engine.

CONCLUSIONS OF LAW

1. This Court is vested with jurisdiction of these proceedings.

2. Petitioner China Union Lines, Ltd. is not entitled to exoneration from or limitation of its liability with respect to the claims made against it.

3. The UNION RELIANCE was grossly at fault, and in violation of the statutes mentioned above, and she and her owners are held solely responsible.

4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions.

5. China Union Lines, Ltd. is not entitled to recover any expense from its cargo as general average.

6. China Union Lines, Ltd. is liable to American Cyanimid Company for loss of its cargo aboard the BEREAN.

7. China Union Lines, Ltd. is liable to Lucy Duncan, surviving widow of Houston Ship Channel Pilot Duncan, for his death resulting from the fault and negligence of petitioner.

8. China Union Lines, Ltd. is liable to the legal representatives or next of kin of the members of the crew of UNION RELIANCE who were killed as result of the casualty; and to those members of the crew who received personal injuries or loss thereby, subject to the reduction by reason of their own negligence as set out in the preceding findings.

9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States.

Done at Houston, Texas, this 17th day of July, 1963.

BEN C. CONNALLY
Ben C. Connally
United States District Judge

APPENDIX D

Testimony of Pilot Charles C. Lary, Jr., of the MV BEREAN regarding the position of the UNION RELIANCE in the bend of the Channel in the vicinity of Beacons 75 and 76.

On direct examination by Mr. Harmon (R. 3544-3545):

"Q. All right. Did you see the UNION RELIANCE at the time she was in the vicinity of 75 and 76?

A. Yes.

Q. All right, sir. Will you just tell the judge in your own words, Captain, where you were at that time, and what you saw happen on the UNION RELIANCE, and what you did on your ship?

A. Well, after passing through 71 and 72, I saw this ship coming in the bend, Judge, at 75 and 76, and she was getting—you have got a set of green ranges right above 75 and 76, and I could see him go past those ranges, and I noticed that if he didn't swing pretty quick, he was going to go to that bank, to the west bank over toward 75."

Testimony in conjunction with the marking of the graph paper diagram—BEREAN Exhibit 63 (R. 3546-3547).

"Q. If you will, mark where she was at the time you were first able to determine—using this cardboard and this green pencil, mark where she was at the time that you saw her coming into the bend.

A. Well, the best I recall, she came on, because she passed—it looked like to me when she came through these

two beacons she was starting, you know, to this side of the channel (indicating).

Q. Yes.

A. Something like that; and she came on—Mr. Eikel: Now, for the record, let's show that he marked the starboard side of the ship at that time.

A. (Continuing) Well, say the starboard side of the ship to the starboard side of the channel."

Further testimony regarding marking of the diagram—BEREAN Exhibit 63 (R. 3548-3549).

"The Court: To be sure I understand, that's where you were when you first saw the UNION RELIANCE pull to the right-hand side of the channel?

A. Yes, sir, when I—when she came in here and started across those ranges, I made the remark to the mate on watch, I said, 'That ship's getting over too far,' you know what I mean? In other words, he was going to have to swing her pretty good to bring her back on the ranges, and I saw him going, and then I could see him cross the ranges; you could see the top range as he went by—

The Court: Well, I'm not interested in that so much as where you were and where he was, so that I can kind of orient myself with your description. But you—

A. This is where I was—

The Court: Let me tell you what I want, please, sir.

A. Yes, sir.

The Court: Show me where the BEREAN was when the UNION RELIANCE was at the very beginning of your green mark, that is, close to 75 and 76.

A. Well, I'd say she was starting—what I am talking about was whenever she was coming by these beacons.

The Court: All right; back up a little bit. Show us where the BEREAN was when you saw the UNION RELIANCE at Beacons 75 and 76.

A. All right, sir (indicating).

The Court: All right. Start your mark there, and show us what your vessel did up to the point of collision.

A. All right, sir.

Q. (By Mr. Harmon) Yes; draw a line there, Captain, and show what your ship did, now.

A. Well, I stayed in the middle, watching him, up to a point, I don't know just exactly, something like this (indicating), and then I changed the course, I think it was—either I changed it to 148 or 149, two or three degrees to the starboard. In other words, I brought it on over like this (indicating), something to that effect.

Q. All right, sir.

A. And roughly in this area, I'd say right here, as we were about roughly, I'd say, six-tenths of a mile apart, well, I heard his anchor chains going and I put her full astern."

On cross-examination by Mr. Eikel, Captain Lary testified as follows (R. 3587-3591):

"Q. Now, Captain, from your—I have asked you this question before, on your deposition, and you were asked the question generally: You have testified now before the Coast Guard and here and this deposition. It was your opinion that this ship was too close to that bank, and

sheered off that bank; that is what caused her to come across, is that right?

A. The reason for the collision?

Q. Yes, sir.

A. She was over on that side, and she come off, yes, sir. I have stated that.

Q. And you have testified that she sheered off that bank; isn't that what you said?

A. That's right, she came off that bank.

Q. Well, you testified that she was too close to that bank, and that is what caused her to come off that bank, the sheer, isn't that right?

A. Yes, that's what I have said.

Q. And that was your opinion before the Coast Guard, and you reaffirmed that opinion in February when we took your deposition?

A. That's right.

Q. And that's still your opinion, is that right?

A. That's right.

Q. And the way you arrived at that opinion was that you saw both those range lights to the east of the UNION RELIANCE as she made that turn at 75-76 buoys or beacons, isn't that right?

A. That's right.

Q. And you testified positively before that you saw both those range lights which mark the center of the channel, of course, and they were clear of the ship's lights when she was making that bend at 75-76, isn't that correct?

A. In other words, the ship was to the west of the—

Q. Of the center of the channel?

A. Of the center of the channel at that time?

Q. Yes, sir.

A. That's right.

Q. And you could see her lights plainly, and you could see the range lights plainly?

A. That's correct.

Q. All right, sir. And that is fundamentally the real reason why you think she sheered off that bank, isn't that correct?

A. That's correct.

Q. Yes, sir. And you testified, at the time of taking your deposition, that you remarked to the mate, and you testified before the Coast Guard, "She is going to have trouble, because she is too close to that bank," isn't that right?

A. Well, I said she was not—I was concerned that she—

Q. Yes, sir.

A. I think I made the statement to the second mate.

Q. All right, sir. And you testified to that statement?

A. I said, 'That ship's getting over too far,' something to that effect.

Q. Yes, sir. And you testified on your deposition that you had been here yourself, and you knew that a ship over that far would in all likelihood sheer; isn't that correct?

A. That's correct.

Q. Yes, sir; and you thought so that night when you first saw her getting over too close, at the time she was passing beacons 75 and 76, isn't that right?

A. That's the reason I dropped my speed to dead slow.

Q. Yes, sir. And where were you when you dropped your speed to dead slow? Will you tell me that, now?

A. Well, I was between that, where it says W and A.

Q. Well, what about this mark X, the second one from the W on that side of the W? Were you there, or not?

A. Well, I think the first X is where I dropped her down to half, and then the Judge wanted the other one when I—I mean the half and slow, and I think right around in there was where I dropped her to dead slow.

Q. You actually dropped her from full ahead to half ahead, to slow ahead, and dead slow ahead, in about a minute or less than a minute, isn't that correct?

A. Something like that, yes, sir.

Q. Yes, sir. And so it was there when you realized, as you have just testified, that this ship was in here too close to the bank, and she was likely to sheer; isn't that correct?

A. That is right.

Q. Do you still affirm that to be the fact?

A. That's a fact.

Q. All right. Now—and you were in the center of the channel?

A. I was in the center of the channel, on those ranges.

Q. You were in complete command of your ship, and the ship handled beautifully, and a good quartermaster at the wheel?

A. That's right.

Q. Yes, sir. And how long after that was it when you gave the full astern order, to give this ship time, as she sheered, to get out of difficulties?

A. Repeat that, please.

Q. I say, how long after this, when you were concerned about her and thought she was going to sheer, as you said she did, was it when you decided to drop your ship to full speed astern? How long after that before you dropped to dead slow was it?

A. Let me get this straight in my mind. You want to know when I realized that the ship was in trouble?

Q. You have already testified to that. I said how long after that time was it when you decided that—when you actually put your ship full astern, how long was it?

A. When I heard him blow the three whistles and let go the anchors.

Q. Yes, sir. All right, sir. So this (indicating) is where he let go the anchor, and this is where your ship was, you said, when he blew the three whistles?

A. When I blew ours back at him, that's right.

Q. Yes, sir. So your ship traveled, then, this distance up to here (indicating), which, of course, on the scale is about two or three ship-lengths, each of these being a hundred feet, and you have, between these points here, you have 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and if you count one of those (indicating) it is 1400 feet your ship traveled before you took any measure at all?

A. At all?

Q. Now wait a minute.

A. All right.

Q. Any measures on your ship at all, of changing your —of going full astern, before you did anything at all, because your course didn't change, you said.

A. I changed course up there (indicating), about two or three degrees to starboard."

Captain Lary further testified on cross examination as follows (R. 3592-3595):

"Q. Yes, sir. So for the time it took your ship to travel about 1400 feet, which is about three ships' lengths, during all of that time, you knew that ship was too close over to the bank, according to this diagram, or your testimony, all of this distance, and you did nothing about reducing your speed any further by backing your ship, did you?

A. No, sir, I didn't.

Q. Yes, sir. Now, if you had decided at this time to give that ship more room in case she sheered across the channel, like you say she did, which you anticipated way back here, if at that time you had gone full astern, would not that have given her more time to break her sheer?

A. I would like for you to rephrase that. If you don't —well, I can answer it. But you are saying—

Q. First, answer my question, sir.

The Court: Had you gone astern earlier than you did, you would have given her more room in case she sheered?

A. Yes, sir. If I would have known, yes, sir, I could have done that.

Q. (By Mr. Eikel) You could have done that?

A. Yes, sir.

Q. And during all this time, when you say you were giving your ship two to three degrees starboard rudder, or right rudder,—

A. Yes.

Q. —you could have stayed in the channel, right on this side of the channel, without steering your helm at all, and you could have gone either way, port or starboard, at any time during that time, couldn't you?

A. That is what I was watching.

Q. Yes, sir.

A. To see what I was going to have to do.

Q. Yes, sir. But it was only here, at this place you marked, about this position, when you heard his anchors dropping and heard what you consider a three-blast signal,—

A. Yes.

Q. —that you put your engines on full astern?

A. That's correct. That's when I knew there was risk of collision.

Q. All right. And that's the first time when you considered that there was a fear of collision?

A. That's right. I knew, he was in trouble, but not a risk of collision.

Q. And you testified that at that time, from that point on, there was no way you could have avoided the collision? That's what you said a moment ago, wasn't it?

A. From what point?

Q. From this point here, where you heard the anchors dropped and went full astern, in your opinion, you could not have avoided the collision at that point, could you?

A. I could not have avoided the collision.

Q. Yes, sir.

A. No, I didn't figure we would. I figured there was risk of collision, but I didn't figure it couldn't be avoided.

Q. All right, now, just tell me what you—at this point, when you went full astern, and at this point where you heard his anchors dropping, and heard him blow the three-blast signal, could you have done something to avoid the collision, or not, now? I just put it to you blankly. What could you have done to avoid the collision then?

A. I tried to do just what I did, run her aground.

Q. Well, now, you didn't answer my question. Could you have avoided the collision at this point, when your ship was there?

A. I don't believe I could have, no.

Q. All right, sir. But you could have avoided the collision anywhere up in here (indicating), by taking different measures, couldn't you?

A. It's possible.

Q. Yes, sir. What could you have done between these two points to have avoided the collision?

A. I could have put her full astern.

Q. Well, if you had put your ship full astern earlier, you wouldn't have had to try to run her into the bank then, would you?

A. I can't say that. I don't know.

Q. All right, sir. But you said that's one thing you could have done to avoid the collision, put your ship full astern, isn't that right?

A. It is one thing I could have done, yes, sir.

Q. Yes, sir.

A. If I would have deemed it necessary.

Q. That's right. Then there is another thing you could have done, if you had put your ship astern here: You would have slowed her so that you certainly could have checked her further with dropping an anchor, couldn't you?

A. It might have helped some, but by running her aground I don't think it would have made any difference."

Captain Lary testified on pages 3596-3597 that, though he knew the UNION RELIANCE "was in trouble" when near the westerly bank, he "figured that she would break her sheer." See following testimony appearing on pages 3596-3597 of the Record:

"Q. All right, sir. So any time in here (indicating), you could have done at least two or three things, any one of which would have been a material influence in avoiding the collision; you could have backed the engines, you could have slowed the ship so you could drop an anchor, or you could have changed course?

A. I was slowing the ship.

Q. All right, you were slowing the ship, but you didn't put her full astern, except here (indicating), is that right?

A. That's right.

Q. All right, sir. And you expected this ship to do exactly what she later did, sheer to her port off of the west or the east bank, when you were back in here and she was up here, a distance on the map there of almost a mile apart, is that correct?

A. I figured she would sheer?

Q. Yes, sir; you said there was danger of it, you remarked to the mate.

A. Yes, sir; I figured that she was in trouble.

Q. Yes, sir.

A. But I figured that she would break her sheer.

Q. But to break her sheer, she would have had to come across the center line over here, and take some measures to bring her back over here, so you knew she was coming over here, didn't you?

A. I knew she was coming back towards the center of the channel, yes.

Q. Yes.

A. I didn't know the draft of the ship.

Q. Yes, but you knew she was a good-sized vessel, didn't you?

A. Well, we had a lot of sailing that night; I didn't know what ship it was till after the collision.

Q. I didn't ask you that, I mean you knew from her lights she was a good-sized vessel?

A. She was a good-sized ship."